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| <p>The widow of a separated Hindu became a convert to Muhammadanism and married a Muhammadan.</p> <p><i>Held</i> that the widow did not thereby lose her interest in the property of her late husband in view of the provisions of Act No. XXI of 1850; nor did section 2 of the Act No. XV of 1856 affect the situation, inasmuch as that section applied to Hindu widows only. <i>Khunni Lal v. Govind Krishna Narain</i>, I.L.R., 33 All., 356, followed. <i>Matungini Gupta v. Ram Rutton Roy</i>, I. L. R., 19 Calc., 289, dissented from.</p> | |
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| they were acting in concert and intended to cause such bodily injury as was likely to cause death. <i>Held</i> that all three assailants were guilty of murder. <i>King-Emperor v. Sullappa Chunnappa</i> , 15 Bom. L. R., 303 and <i>King-Emperor v. Kankai</i> , I. L. R., 35 All., 329, followed. <i>Emperor v. Bhola Singh</i> , I. L. R., 29 All., 282, <i>Queen Empress v. Duma Baidya</i> , I. L. R., 19 Mad., 496, <i>Gouridas Namasudra v. Emperor</i> , I. L. R., 36 Cal., 659, <i>Empress v. Dharam Rai</i> , Weekly Notes, 1887, p. 236, <i>Dhian Singh v. King-Emperor</i> , 9 A. L. J., 180, distinguished. | Page. |
| <i>Emperor v. Ram Nowaz</i> | 506 |
| ACTS—1860—XLV—(INDIAN PENAL CODE), SECTIONS 37, 302, 304— <i>Murder—Culpable homicide not amounting to murder—Fatal assault with lathis by several persons acting in concert.</i>] Five men—members of the same family—assaulted an unarmed man and beat him with their lathis. They knocked him down and continued beating him, with the result that he died then and there. Another man, who came to the rescue of the first, was also knocked down and beaten by the same five men with a similar result. | |
| <i>Held</i> that all five men were in each case guilty of the offence of murder. <i>Dhian Singh v. King-Emperor</i> , 9 A. L. J., 180, dissented from. | |
| <i>Emperor v. Hanuman</i> | 560 |
| SECTIONS 182, 193— <i>Complaint—Statement made to the Magistrate as head of the police and not as a magistrate.</i>] P. appeared before a District Magistrate and made a statement in which he accused a certain police officer of having beaten him, demanded a bribe of him and locked him up in the police <i>hawalat</i> . He stated, however, that he did not wish to make a complaint, but only desired that an inquiry should be made. Nevertheless the Magistrate examined P. on oath, and subsequently, the charge having been found to be baseless, P. was convicted under sections 182 and 193 of the Indian Penal Code. <i>Held</i> that inasmuch as P. had expressly stated that he did not wish to make a complaint, the statement must be taken to have been made to the District Magistrate, not as magistrate, but as head of the district police and the conviction under section 193 of the Code could not be upheld. | |
| <i>Emperor v. Phulel</i> | 102 |
| SECTION 188— <i>Order duly promulgated by public servant—Order forbidding persons to enter railway premises except for travelling.</i>] <i>Held</i> that the public have a right to enter upon railway premises for many purposes other than travelling, and an order forbidding persons to enter a railway station except for <i>bond fide</i> purposes of travelling would be an illegal order. | |
| In the particular instance, however, it did not appear that the order in question was issued by any authority which, supposing it to be otherwise legal, would have had power to issue it. | |
| <i>Emperor v. Rama</i> | 196 |
| SECTION 199— <i>Sanction to prosecute—Prosecution based on alleged false declaration—Declaration inadmissible in evidence.</i>] A declaration, before it can be made the foundation of a prosecution under section 199 of the Indian Penal Code, must be one which is admissible in evidence, and which the court before which it is filed is bound or authorized by law to receive in evidence. | |
| <i>Emperor v. Ram Prasad</i> | 58 |
| SECTIONS 306 AND 325.— <i>Murder—Grievous hurt—Common intention—Deadly assault with lathis on an unarmed person—Presumption.</i>] Four persons armed with lathis attacked and severely beat a fifth, who was unarmed, over a dispute about irrigation. The person attacked died in consequence of | |

this beating, and it was found that he had received several severe blows on the head, the result of which was that the bones of the skull were broken to pieces, and also other injuries about the body, most of the injuries having probably been inflicted whilst the person attacked was on the ground; but the evidence did not disclose which of the assailants caused which of the injuries. *Held*, that all four assailants were properly convicted of murder under the fourth clause of section 300 of the Indian Penal Code, and that the inference was not justified that the common intention of the assailants was not more than the causing of grievous hurt.

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| Emperor v. Kanhai | 329 |
| ACTS—1860—XLV (INDIAN PENAL CODE), SECTIONS 406 AND 408.— <i>Criminal breach of trust—Water-works inspector misappropriating water—Money realized as water tax not credited to the municipality.</i> Where a municipal water-works inspector, being the lessor of a house within municipal limits, had such house connected with a municipal water main and accepted a yearly payment as water tax from his tenants, but neither informed the municipal board that the connection had been made nor credited to the board the money which he received as water tax from his tenants, it was <i>held</i> that he was properly convicted under sections 406 and 408 of the Indian Penal Code, whether or not he might have been punishable under the United Provinces Water Works Act, 1891. | |
| Emperor v. Bhimala Charan Roy | 361 |
| SECTION 406, <i>See</i> Criminal Procedure Code, section 179 | 29 |
| —1865—X (INDIAN SUCCESSION ACT), SECTION 244— <i>Civil Procedure Code (1908) section 2—Will—Probate—Application for probate dismissed—“Decree”—“Order”—Appeal.</i> <i>Held</i> that the order of a District Judge granting or refusing probate of a will on an application made under the provisions of section 244 of the Indian Succession Act, 1865, is a decree within the meaning of section 2 of the Code of Civil Procedure, 1908, and appealable as such. <i>Held</i> also that the court fee payable on such an appeal is Rs. 10 under article 17, clause VI, of the second schedule to the Court Fees Act, 1870. | |
| Unrao Chand v. Bindrahan Chand, I. L. R., 17 All., 475; Esoof Hashim Doolpy v. Fatima Bibi, I. L. R., 24 Cal., 30, and Sheikh Azim v. Chandra Nath Namdas, S. C. W. N., 748. | |
| Mountstephens v. Garnett-Orme | 448 |
| —1867—III (PUBLIC GAMBLING ACT), SECTIONS 3 AND 4— <i>Presumption—Warrant not in accordance with provisions of Act.</i> <i>Held</i> that a warrant authorizing the search of any house which the police officer to whom it has issued might think proper to search was not a legal warrant within the provisions of the Public Gambling Act, 1867. | |
| Emperor v. Hargobind | 1 |
| —1869—I (OUDH ESTATES ACT), SECTIONS 2, 3, 8, 10 AND 22— <i>Summary and regular settlement of Oudh—Villages settled on grantee whose name was entered as owner in Lists 1 and 2 of those prepared under section 8—“Talugdar”—“Estate” under section 2—Impartible property—Kabuliat executed by grantee after the time limit specified in section 3—Suit for partition—After-acquired properties held to be partible, there being no intention shown to incorporate them with the impartible property.</i> At the summary settlement of Oudh an order was made on the 5th of October, 1859, for the settlement of certain villages with the ancestor of the parties to these | |

appeals, who, however, did not execute his *kabuliat* until the 13th of October, 1859, and so not within the time limit specified in section 3 of the Oudh Estates Act (I of 1869), namely "between the 1st of April, 1858, and the 10th of October, 1859." At the regular settlement, shortly afterwards, the grantee recovered decrees for possession of other villages; and subsequently acquired other properties by purchase. In respect of all the settled villages his name was entered in Lists 1 and 2 prepared under the statutory provisions of section 8 of the Act. In a suit for partition to which the defence was that all the property was impartible.

Held (affirming the decisions of the Courts in India) that the grantee (the defendant) was on the construction of the provisions of Act I of 1869 relating thereto, a "talukdar," and the villages so settled with him formed, within the meaning of the Act, an "estate" which was impartible and descendible to a single heir.

On a question whether the delay in executing the *kabuliat* deprived the taluqa of the character of an "estate" defined in section 2 of the Act, the Judges of the Judicial Commissioner's Court differed in opinion.

Held, in the absence of an express declaration that non-execution within the time specified would be fatal to the right given to the grantee by section 3, that no such construction could be put on that section; but the execution of the *kabuliat* related back to the date of the settlement, namely, the 5th of October, 1859.

As to the after-acquired properties the defendant contended that by the custom of the family they became part of the original estate and were therefore not subject to the ordinary Hindu law of inheritance.

Held (affirming the decisions of both courts below) that the evidence was insufficient to establish that custom: that no intention of the talukdar was shown to incorporate the subsequently acquired properties with the taluqa, as was necessary on the authority of the case of *Parbati Kumari Debi v Jagdis Chunder Dhabal*; I.L.R., 29 Cal., 433 (453); L. R., 29 I. A., 82 (98), and that the plaintiff was therefore entitled to a decree for his share (one half) of such properties as being partible.

Janki Prasad Singh v. Dwarka Prasad Singh 391

ACTS—1870—VII (COURT FEES ACT), SECTION 7, CLAUSE ix—*Decree on mortgage—Separate liabilities of distinct properties—Appeal in respect of distinct properties.* In suit for sale on a mortgage a decree was passed declaring the separate liabilities of the different properties mortgaged. One of the defendants whose property was held liable for specific sums of money appealed. *Held* that the proper court fee payable on the memorandum of appeal was a fee calculated on the sum of money for which the defendant's property was held liable and not one calculated on the full amount of the decree.

Ohshabraj Kunwar v. The Court of Wards 92

SECTION 7, CLAUSE ix—*Suit for sale on mortgage—Court fee payable in appeal—Value of the subject-matter—Amount declared due on the date fixed for payment.* [A decree for sale on a mortgage declared that on the date fixed for payment a specified sum would be due from the mortgagor which included interest *pendente lite*.

Held that the court fee payable in appeal from such decree was to be assessed, not on the amount claimed in the suit but upon the amount with interest *pendente lite* found due by the court of first instance at the date fixed for payment.

Baldeo Singh v. Kalka Prasad 94

ACTS—1872—I (INDIAN EVIDENCE ACT), SECTION 91—*Evidence, admissibility of—Confession made to inquiring magistrate but not recorded by him in writing—Criminal Procedure Code, sections 364 and 533.*] Held that a confession of an accused person made to a magistrate holding an inquiry is a matter required by law to be reduced to the form of a document within the meaning of section 91 of the Indian Evidence Act, 1872, and that no evidence can be given of the terms of such a confession except the record, if any, made under section 364 of the Code of Criminal Procedure. Section 533 of the Criminal Procedure Code has no application to a case where no record whatever has been made of such a confession.

Emperor v. Gulabu 260

SECTION 92, PROVISIO I—*Evidence—Proof of failure of consideration—Promissory note given partly on account of a gambling debt.*] The defendant who had been gambling with the plaintiffs and had lost, gave the plaintiffs two promissory notes, partly for his gambling losses and partly on other accounts, but it could not be ascertained what proportion of the total sum secured was represented by the gambling debts.

Held, on suit to recover on these notes, that it was open to the defendants to prove that the consideration was in part at least money lost in gambling; and that the court below was justified, on its finding that the part of the consideration represented by gambling debts could not be separated from the rest, in dismissing the whole suit. *Juggernaut Sew Bux v. Ram Dayal*, I. L. R., 9 Calo., 791, distinguished.

Balagobind v. Bhaggu Mal 558

—1872—IX (INDIAN CONTRACT ACT), SECTION 11.—*Minor—Sale—Minor vendee subsequently dispossessed by third party—Right of vendee to recover purchase money from vendor.*] Where certain zamindari property was sold to persons who were minors at the time of sale, and the purchasers were subsequently ousted on suit by third parties, it was held that the purchasers were at any rate entitled to recover from the vendors the sum which they had paid as purchase money. *Mir Sarwarjan v. Fakhr-ud-din Mahomed Chowdhuri*, 9 A. L. J., 33; L. R., 39 I. A., 1; I. L. R., 39 Calo., 232 and *Mohri Bibee v. Dharmodas Ghose*, I. L. R., 30 Calo., 539, distinguished.

Walidad Khan v. Janak Singh 370

—1873—X (INDIAN OATHS ACT), SECTION, 13, See Act (Local) No. IV of 1910, section 60 575

—1873—XIX—(NORTH WESTERN PROVINCES AND OUDH LAND REVENUE ACT), SECTIONS, 146, 148 AND 167 —“*Proprietor.*”—*Mortgage by muafidar—Sale of mahal for default in payment of Government Revenue—Rights of purchaser and mortgagees of muafi.*] Where certain muafidars, whose rights as such accrued before the year 1870, and were not shown to have been created by the zamindars of the mahal in which the muafi land in question was situate, executed a usufructuary mortgage of such land, and thereafter the mahal was sold for default in payment of Government revenue, it was held that the rights of the mortgagees were not extinguished in favour of the purchaser.

Kunwar Sen v. Jwala Prasad 190

—1875—IX—(INDIAN MAJORITY ACT), SECTION 3—*Guardian and minor—Effect of appointment of Hindu widow as guardian of her minor sons—Sale of minor's property.*] A Hindu died leaving a widow and two minor sons. The widow was appointed in 1890 guardian of the two sons, and in 1891 obtained sanction from the District Judge for the sale of half of the property of the minors. In 1906, the widow and the elder son, who had then attained majority

sold part of the property of the sons amounting to somewhat less than half. Within three years of his coming of age the younger son sued for a declaration that the sale of 1906, and a mortgage executed in 1904 were not binding on his interest in the property purporting to be dealt with thereby.

Held (1) that the appointment of the mother as guardian had the effect of prolonging the minority of both sons until they reached the age of twenty-one years; and (2) that the sanction of the Judge given in 1891 could not validate a sale which was not made until 1906. *Gharib-ullah v. Khalik Singh*, I. L. R., 25 All., 407, distinguished.

Shami Nath Sahi v. Lalji Chaube 150

ACTS—1877—I (SPECIFIC RELIEF ACT), SECTION 42, *See* Minor .. 487

—1877—III (INDIAN REGISTRATION ACT), SECTION 17 (a)—*Mortgage—Agreement to relinquish portion of principal and all interest—Acknowledgement—Registration.* *Held* that an agreement executed by a mortgagee after the date of the mortgage whereby he relinquished a certain part of the principal and all interest, past and future, on the mortgage in lieu of certain services rendered by the mortgagor to the mortgagee was a document which required registration to make it admissible in evidence, and it could not be said to be an acknowledgement of payment within the meaning of the exception contained in section 17, clause (v), of the Indian Registration Act, 1877.

Gobardhan Sahi v. Jadunath Rai 202

SECTION 21—*Registration—How far a misdescription of property comprised in a deed may invalidate registration.* Where one of several villages comprised in a registered mortgage deed was described as being in a wrong tappa, the description being, notwithstanding this error, sufficient for identification, it was *held* that the misdescription was not sufficient to invalidate the mortgage as regards the village in question. *Beni Madho Singh v. Jagat Singh*, 10 A. L. J., 33, referred to.

Parsotam Das v. Patesri Partab Narain Singh .. 250

—1877—XV (INDIAN LIMITATION ACT), SECTION 9, *See* Act No. XV of 1877, section 19, and schedule II, article 148 .. 227

SECTION 19 AND SCHEDULE II, ARTICLE 148—*Acknowledgement, effect of—Acknowledgement by widow in possession of husband's estate—Suspension of limitation—Act XV of 1877, section 9—Act XIV of 1859, section I, clause 15—Res judicata—Contentions raised for the first time on appeal to His Majesty in Council—Practice of Privy Council.* In a suit brought by the appellant on the 4th of March, 1907, against the respondents for the redemption of a mortgage, dated the 2nd of January, 1842, made between the respective predecessors in title of the parties and in which no date for redemption was specified, acknowledgements of the mortgagor's right had been made by the widow and daughter of a former mortgagee, a predecessor in title of the respondents, which, the appellant contended, extended the period of limitation.

Held that the law of limitation applicable to the case was not Act XIV of 1859, the law in force at the date of the acknowledgements, but Act XV of 1877, which was in force at the time of the institution of the suit.

Under article 148 of schedule II to that Act the period of limitation prescribed for a suit to redeem a mortgage was 60 years from the time when the right to redeem accrued, and by section 19 an acknowledgement to be effective must be "signed by the party against whom such right is claimed or by some person through whom he claims title."

Held that the respondents derived title through the last male owner, and not through his widow and daughter, who were therefore not competent under section 19 to make an acknowledgement of the right of redemption so as to bind any interests except their own. To hold otherwise would be to extend the power of a Hindu female in possession of a limited interest to bind the estate to an extent which was not sanctioned by authority.

An acknowledgement of liability only extends the period of limitation within which the suit must be brought, and does not confer title, and, with reference to section 2 of Act XV of 1877, was not a "thing done" within the meaning of section 6 of the General Clauses Consolidation Act (I of 1868.)

There was nothing in article 148 of schedule II of Act XV of 1877 to justify a holding that by reason of the fusion of the interests of the mortgagor and mortgagee (which, it was alleged, took place between the years 1883 and 1898) the period of limitation, which began to run on the 3rd of January, 1842, was suspended, which would be deciding contrary to section 9 of the Act: this suit not being one to which the proviso to that section applied.

Burrell v. Earl of Egremont, 7 Beav., 205, distinguished.

The present suit was not barred, as *res judicata* by a former suit in 1904.

With regard to contentions raised on this appeal which had not been raised before at any stage of the case, and consequently had not been considered by any of the courts below, nor were even suggested in the reasons in the case of the appellant to England, their Lordships adhered to the established practice of the Board not to allow new cases to be made for the first time on appeal to His Majesty in Council.

Soni Ram v Kanhaiya Lal 227

ACTS—1882—IV (TRANSFER OF PROPERTY ACT), SECTIONS 59, 100—*Mortgage—Charge—Attestation—Document attested by one witness only.*] *Held* that a document which purported to be a mortgage, but which was attested by only one witness, could not operate either as a mortgage or as creating a charge on immovable property within the meaning of section 100 of the Transfer of Property Act, 1882. *Shamu Patter v Abdul Kadir Ravuthan*, I. L. R., 35 Mad., 607, referred to.

Collector of Mirzapur v. Bhagwan Prasad 164

SECTION 65 (a), See
Mortgage 48

SECTION 111, CLAUSE
(g)—*Landlord and tenant—Denial of title—Suit for ejectment of tenant—Landlord's intention to take advantage of denial of title to be expressed before suit.*] The denial of his landlord's title by a tenant, in order to work a forfeiture under section 111 (g) of the Transfer of Property Act, 1882, must be an unequivocal and unambiguous denial: mere non-payment of rent or even the mortgaging of the premises as belonging to the tenant does not necessarily constitute such a denial. A landlord wishing to take advantage of his tenant's denial of title to determine the lease must do some act showing his intention to do so before he can file a suit for ejectment.

Prag Narain v. Kadir Bakhsh 145

VI (INDIAN COMPANIES ACT), SECTION 74—*Penalty—Criminal Procedure Code, section 260—Summary jurisdiction—Power to try summarily offences under the Indian Companies Act.*] *Held* that there is nothing in law to prevent a Magistrate from trying summarily offences under the Indian Companies Act, 1882.

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Held also that the penalty provided by section 74 of the Indian Companies Act, 1882, is a fixed and not a maximum penalty. Queen Empress v. Moore, I. L. R., 20 Calc., 696, referred to.

Emperor v. Dina Nath 173

AOTS—1882—VI (INDIAN COMPANIES ACT), SECTION 169—*Company—Winding up—Appeal—Limitation—Notice.*] *Held* that the provisions of section 169 of the Indian Companies Act, 1882, as to service of notice of appeal are imperative, and if the requisite notice has not been served within three weeks from the date of the order complained of and the time for service has not been extended by the appellate court, the appeal cannot be heard.

O. J. Bower v. Imperial Bank, Limited 177

—1883—XV (NORTH-WESTERN PROVINCES AND OUDH MUNICIPALITIES ACT), SECTION 10—*Act (Local No. I of 1900, United Provinces Municipalities Act), section 187—Municipal Board—Election—Suit to set aside election—Jurisdiction of Civil Court—Limitation Act No. IX of 1908 (Indian Limitation Act), schedule I, article 120.*] *Held* that an order of the Government directing that a particular municipal election held in the year 1911 should be conducted according to certain rules passed in 1884, and not according to the rules passed *in pari materia* in 1910, which superseded those of 1884, was *ultra vires*, and that inasmuch as the rules of 1884 did not apply and the election was not held under the rules of 1910, a suit would lie in a civil court to contest the election, irrespective of anything contained in either set of rules, the period of limitation applicable to which was that prescribed by article 120 of the first schedule to the Indian Limitation Act, 1908. *Gur Charan Das v. Har. Sarup, I. L. R., 34 All., 391, referred to.*

Raghubandan Prasad v. Sheo Prasad 308

—1887—IX (PROVINCIAL SMALL CAUSE COURTS ACT), SCHEDULE II, ARTICLE 13, *See Act No. X of 1897, section 3 (25)* 156

—1889—VII (SUCCESSION CERTIFICATE ACT)—*Certificate of succession—Joint certificate not illegal if granted with the consent of the grantees.*] *Held* that the grant of a joint certificate under the provisions of the Succession Certificate Act, 1889, is not illegal, provided that the persons to whom such certificate is granted all consent to its being granted in this form.

Ram Raj v. Brij Nath 470

—SECTIONS 4 AND 16—*Succession certificate—Holder of certificate not entitled to transfer his rights thereunder.*] *Held* that the rights conferred by the grant of a succession certificate under the Succession Certificate Act, 1889, are personal to the grantee and cannot be assigned.

Allahdad Khan v. Sant Ram 74

—SECTION 9—*Certificate in favour of Hindu widow to realize interest only—Certificate ultra vires.*] *Held* that, where a certificate was granted to a Hindu widow for collection of debts due to her late husband, it was not competent to the Court, in lieu of requiring security from the grantee, to give a certificate for realization of interest only without disturbing capital. *Shib Dei v. Ajudhia Prasad, F. A. F. O. No. 108 of 1910, decided on the 13th of February, 1911, referred to.*

Jai Dei v. Banwari Lal 249

—1890—VIII (GUARDIANS AND WARDS ACT), SECTION 20—*Guardian and minor—Certificated guardian—Sale—Powers of certificated guardian different from those of a guardian under the general rule of law.*] The powers of a certificated guardian are regulated and defined by the Guardians and Wards Act, and the rule of law, that,

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| there being no mutuality in a contract to which a minor was a party, it could not be enforced by him, does not apply to a contract for the sale of immovable property entered into by the certificated guardian of a minor with the sanction of the Court; such a contract is valid and a suit for damages for breach of the contract will lie on behalf of the minor. <i>Mir Sarwarjan v. Fakhruddin Mahomed Chawdhuri</i> , I. L.R., 39 Cal., 232, distinguished | |
| Babu Ram v. Said-un-nissa | 499 |
| ACTS—1893—IV (PARTITION ACT), SECTIONS 1, 2 AND 3— <i>Partition—Mortgagee rights in a revenue-paying mahal—Application for sale by owners of less than a moiety—Act (Local) No III of 1901 (United Provinces Land Revenue Act), section 107.</i>] Mortgagee rights merely in a revenue-paying mahal do not fall within the purview of the United Provinces Land Revenue Act, 1901, for the purposes of partition: consequently the provisions of the Partition Act, 1893, apply to the partition amongst co-owners of such rights. But an order for sale of the mortgagee rights under section 2 of the Partition Act will not be valid unless based upon the request of a party or parties interested to the extent of one moiety or upwards. | |
| Banke Lal v. Shanti Prasad | 387 |
| —1894—I (LAND ACQUISITION ACT), SECTION 30— <i>Compensation—Mode of apportioning amount allotted as compensation between different interests.</i>] Where land which is taken up under the Land Acquisition Act belongs to two or more persons the nature of whose interest therein differs, the compensation allotted therefor must be apportioned according to the value of the interest of each person having rights therein so far as such value can be ascertained. | |
| Hirde Narain v. Powell | 9 |
| —1897—X (GENERAL CLAUSES ACT), SECTION 3(25)— <i>Act No. IX of 1887 (Provincial Small Cause Courts Act), schedule II, article 13—Court of Small Causes—Jurisdiction—Ferry—"Immovable property"—Suit to recover tolls alleged to be due to plaintiff as lessee of a ferry.</i>] Held that the right to a ferry is a benefit which arises out of land and comes within the definition of immovable property under section 3 (25) of the General Clauses Act, 1897, and a suit by a lessee of a ferry to levy a toll alleged to be recoverable by him as such lessee falls under article 13 of the second schedule to the Provincial Small Cause Courts Act and is therefore not cognizable by that court. <i>Gokal Chand v. Lal Chand</i> , Punj. Rec., 1897, Case No. 48, p. 215, and <i>Desa Singh v. Narain Das</i> , Punj. Rec., 1898, Case No. 80, p. 278, approved. | |
| Abdul Hamid Khan v. Babu Lal | 156 |
| —1899—II (INDIAN STAMP ACT), SECTIONS 2 (23), 62 AND 63— <i>Sarkhat—Memorandum of account—Receipt—Several items of over Rs. 20 each—Each item to be stamped.</i>] Held that a memorandum of account between debtor and creditor, which was left in the possession of the debtor and consisted of items entered from time to time of money advanced and repaid, was a document which required a separate receipt stamp in respect of each item of over Rs. 20. | |
| Emperor v. Tulshi Ram | 290 |
| —1907—III (PROVINCIAL INSOLVENCY ACT), SECTIONS 22, 46 AND 52— <i>Act No. IX of 1908—Indian Limitation Act, section 5—Insolvency—Application to court to reverse act of receiver—Limitation.</i>] Held that section 5 of the Indian Limitation Act, 1908, does not apply to applications contemplated by section 22 of the Provincial Insolvency Act, 1907. <i>Dropadi v. Hira Lal</i> , I. L. R., 34 All., 496, distinguished. | |
| Thakur Prasad v. Panno Lal | 410 |

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| ACTS—1908—IX (INDIAN LIMITATION ACT), SECTION 5, <i>See</i> Act No. III of 1907, sections 22, 46 and 52 | 410 |
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| SECTION 19— <i>Limitation—Acknowledgement—Requisites for valid acknowledgement.</i>] <i>Held</i> that an acknowledgement of a debt to be a valid acknowledgement within the meaning of section 19 of the Indian Limitation Act, 1908, need not be addressed to the creditor, but may be made to some other person, as, e.g., by means of a deposition in court. | |
| <i>Held</i> also that a statement in the form "The whole of Janki Prasad's mortgage money is owing," there being in existence at the time two mortgages held by Janki Prasad, must be taken to apply to both, in the absence of evidence indicating a different signification. <i>Maniraram Seth v. Seth Rurchand</i> , I. L. R., 33 Calc., 1047, and <i>Mylapore Iyasawmy Vyapoory Moodliar v. Yeo Kay</i> , I. L. R., 14 Calc., 801, referred to. | |
| Megh Raj v. Mathura Das. | 437 |
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| SECTION 20— <i>Limitation—Interest—Payment of part of interest due—Suit for foreclosure.</i>] The word "interest" in section 20 of the Limitation Act means interest or any part of the interest due. <i>Kallu v. Halki</i> , I. L. R., 18 All., 95, and <i>Anwar Husain v. Lalmir Khan</i> , I. L. R., 26 All., 167, distinguished. | |
| Abdul Ahad v. Mahtab Bibi | 378 |
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| SECTION 31— <i>Limitation—Mortgage—Suit on mortgage barred under Limitation Act of 1871—Mortgagee's rights not revived by present Act.</i>] <i>Held</i> that section 31 of the Indian Limitation Act, 1908, cannot be construed as reviving rights already time-barred under the Limitation Act of 1871. | |
| Jai Singh Prasad v. Surja Singh | 167 |
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| SECTION 31, <i>See</i> Act No. IX of 1871, section 21 | 270 |
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| SCHEDULE I, ARTICLES 62 AND 120, <i>See</i> Civil Procedure Code (1882), section 315 | 419 |
| <hr/> | |
| SCHEDULE I, ARTICLE 75— <i>Bond—Option of suing for whole amount due on default of payment of instalments—Limitation.</i>] A bond payable by instalments gave to the creditor the option of suing for the whole amount due on default in payment of any instalment or of suing for the instalments separately. Two instalments were paid; the third was not, and more than six years after default in payment of the instalment nothing further having been paid on the bond, the creditor sued to recover the whole amount due stating that the cause of action arose on the date when the third instalment became due. | |
| <i>Held</i> that the suit was time-barred. <i>Ajudhia v. Kunjal</i> , I. L. R., 30 All., 123, distinguished. | |
| Amolak Chand v. Baijnath | 455 |
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| SCHEDULE I, ARTICLES 91 AND 120— <i>Limitation—Suit for declaration that nominal lessee is not the beneficial lessee but merely benamidar for the plaintiff.</i>] <i>Held</i> that a suit for a declaration that the defendant, whose name appeared in a certain lease as lessee, had no interest under the lease and that the person really interested in the lease was the plaintiff, was governed as to limitation by article 120 and not by article 91 of the first schedule to the Indian Limitation Act, 1908, the cause of the action accruing to the plaintiff when his position as a lessee was challenged. | |
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| ACTS—1908—IX (INDIAN LIMITATION ACT), SCHEDULE I, ARTICLE 120, See Act No. XV of 1883, section 10 | 308 |
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| SCHEDULE I, ARTICLE 128— <i>Execution of decree—Limitation—Step in aid of execution—Appli- cation for transfer of decrees—Civil Procedure Code (1882), section 223.] Held, that an application made to the court passing a decree to transfer it for execution to another court is an application to take a step in aid of execution within the meaning of article 182 of the first schedule to the Indian Limitation Act, 1908. Chundra Nath, Gossami v. Gurroo Prosunno Ghose, I. L. R., 22 Calc., 375, followed.</i> Todar Mal v. Phola Kunwar | 389 |
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| SCHEDULE I, ARTICLE 132— <i>Limitation—Malikana—Suit for malikana—Decree asked for against property charged.] Where a plaintiff sued for the recovery of mali- kana for 11 years and claimed a decree against the property on which the malikana was charged, it was held that the suit was within time having regard to article 132 of the first schedule to the Indian Limi- tation Act, 1908. Kallar Roy v. Ganga Pershad Singh, I. L. R., 33 Calc., 998, distinguished.</i> Shaida Ali v. Phullo | 185 |
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| SCHEDULE I, ARTICLES 138 AND 144— <i>Execution of decree—Successive purchasers of same property —Suit by subsequent purchaser to recover from earlier purchaser— Limitation.] Article 138 of the Limitation Act only applies to suits in which the auction purchaser is the plaintiff and the judge- ment-debtor or some one claiming through him, is the defendant. Ram Lakhan Rai v. Gajadhar Rai, I. L. R., 34 All., 224, and Khiroda Kanta Roy v. Krishna Das Laha, 12 O. L. J., 378, referred to.</i> Bhagwant Singh v. Bholi Singh | 432 |
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| ARTICLE 181, See Execution of decrees | 178 |
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| —1908—XVI (INDIAN REGISTRATION ACT), SECTIONS 17 (b), 49— <i>Document compulsorily registrable—Assignment of decree for sale of immovable property.] Held that a deed of assignment of a final decree for the sale of mortgaged property under order XXXIV, rule 5, of the Code of Civil Procedure, 1908, is not a document which is compulsorily registrable under the provisions of section 17 (b) of the Indian Registration Act, 1908. Gopal Narayan v. Trimbak Sadashiv, I. L. R., 1 Bom., 267, and Mutasaddi Lal v. Muhammad Hanif, 10 A. L. J., 167, distinguished. Abdul Majid v. Muhammad Faizullah, I. L. R., 13 All., 89, and Baij Nath Lohea v. Binoyendra Nath Palit, 6 C. W. N., 5, followed.</i> Mumtaz Ahmad v. Sri Ram | 524 |
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| SECTIONS 31, 32, 52 AND 87— <i>Registration "Presentation"—Presentation by a person not an authorized agent of the executant—Procedure—Invalid presentation not a mere question of procedure.] Where a document is presented for registration by a person not duly authorized to present it accord- ing to the law applicable to registration of documents, such presenta- tion is altogether invalid, and its subsequent registration, made upon the admission of the executant before an officer who had no jurisdic- tion to accept the document for registration, is likewise invalid. Mujib-un-nissa v. Abdur Rahim, I. L. R., 23 All., 233, followed.</i> Khalil-ud-din Ahmad v. Banni Bibi | 34 |
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| SECTION 32—"Presenta- tion"— <i>Presentation by a servant of the mortgagor in the presence of</i> | |

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the mortgagor.] Where a mortgage deed was handed over to the sub-registrar for the purpose of registration by a person other than the mortgagor, but the mortgagor was present assenting to the registration of the document with full knowledge of what was being done in the office of the sub-registrar: *held* that the presentation was a valid presentation within the meaning of section 32 of the Registration Act. *Nath Mal v. Abdul Wahid Khan*, I. L. R., 34 All., 355, followed. *Mujib-un-nissa v. Abdur Rahim*, I. L. R., 23 All., 233, distinguished. *Jambu Prasad v. Aftab Ali Khan*, I. L. R., 34 All., 331, not followed.

Karta Kishan v. Harnam Chand 72

ACTS—1908—XVI—(INDIAN REGISTRATION ACT), SECTION 32—*Registration*—“*Presentation*”—*Physical delivery of document by person not authorized to ‘present’ it, but executant present and assenting whilst registration was going on.*] Where it is shown that, prior to the registration of the document by the duly authorized official, a person competent to present the document for registration was present before that official assenting to the registration, the requirements of the Registration Act are sufficiently complied with. *Mujib-un-nissa v. Abdur Rahim*, I. L. R., 23 All., 233, and *Karta Kishan v. Harnam Chand*. I. L. R., 35 All., 72, referred to.

Atma Ram v. Ugra Sen 134

SECTION 50—*Registered and unregistered documents—Priority—Effect on rights of prior unregistered mortgage of sale in execution of a decree on a subsequent registered mortgage.*] When property is sold in execution of a decree on a subsequent registered mortgage taking priority over a prior unregistered mortgage such sale does not have the effect of invalidating the prior mortgage or of extinguishing altogether the rights of the mortgagee thereunder, but his debt would still be recoverable from the surplus, if any, left after the satisfaction of the registered mortgage.

Dhanpal Singh v. Budh Singh 271

—(LOCAL)—1900—I (UNITED PROVINCES MUNICIPALITIES ACT), SECTION 88.—*Municipal Board—Power of Board to order demolition of structure overhanging a public road—Compensation—Offer to pay compensation not a condition precedent to order for demolition.*] The owner of a house to which was attached a balcony overhanging a public road repaired the balcony, which had become dilapidated, and made it serviceable but without obtaining the permission of the Municipal Board thereto. The board thereupon issued notice to the house-owner under section 88 of the Municipalities Act, 1900, to remove the balcony, and, in default of compliance, prosecuted him.

Held that the board had power, under section 88, clause (2), of the said Act, to order the removal of the balcony without assigning any reason, and that it was not necessary for the board, in the case of a notice issued under section 88, to tender or express its willingness to pay compensation in respect of the structure the demolition of which was ordered.

Emperor v. Nanna Mal 375

SECTION 128 (h) (i)—*Municipal Board—Power of Board to make rules—Rules regulating use by hawkers of patris of public roads.*] *Held* that the United Provinces Municipalities Act, 1900, does not empower a Municipal Board to make rules regulating the sale or exposure for sale of goods in streets or public places under the control of the board.

Emperor v. Imami 24

ACTS—LOCAL.—1900—I (UNITED PROVINCES MUNICIPALITIES ACT).
SECTION 187—*Municipal election—Rules framed by Local Government for regulation of election—Petition by defeated candidate—Appeal—Procedura—"Decree"—"Order."* Held, on a construction of rule 42 of the rules framed by the Local Government under section 187 of the Municipalities Act, 1900, for the regulation of municipal elections, that the term "competent court" as used in rule 42 means a civil court of competent jurisdiction with reference to the valuation given by the petitioner in his petition. *Gur Charan Das v. Har Sarup*, I L. R., 34 All., 391, followed. Held also, that no appeal lies from the order of a competent court passed on an election petition under rule 42 above referred to. *Sundar Lal v. Muhammad Faiz*, 16 Oudh Cases, 36, approved. *Raghuandan Prasad v. Sheo Prasad*, I L. R., 35 All., 308, and *Sathapat Singh v. Abdul Ghafur*, I L. R., 24 Cal., 107, referred to.

Khunni Lal v. Raghuandan Prasad 450

SECTION 187 (1)(h)—*Municipal election—Rules framed by the Local Government for regulation of elections—Validity of rules—Petition against successful candidate—Appeal* Held (1) that the provisions of section 187 of the United Provinces Municipalities Act which gave power to the Local Government to make rules "generally for regulating all elections under the Act," were wide enough to include rules for the filing and decision of election petitions; and (2) that no appeal lies from the order of a "competent court" passed on an election petition under rule 42 of the rules framed by the Local Government under section 187 (1), clause (h) of the Act. *Khunni Lal v. Raghuandan Prasad*, I L. R., 35 All., 450, followed. *Sundar Lal v. Muhammad Faiz*, 16 Oudh Cases, 36, approved.

Nand Ram v. Chhote Lal 578

SECTION 187, See Act No. XV of 1883, section 10 303

1901—II (AGRA TENANCY ACT), SECTION 4; CHAPTER X—*"Land"—Resumption of rent-free grants—Grove-land—Suit for resumption of grove-land not maintainable in Revenue Court.* Held that grove-land not being "land held for agricultural purposes" within the meaning of section 4 (2) of the Agra Tenancy Act, 1901, nor "land" within the meaning of Chapter X of the Act, no suit will lie in a Revenue Court for resumption of rent-free grant of grove-land. *Sheomangal v. Sardar Singh*, 6 A. L. J., 749, and *Mugh Singh v. Nasar Fatima*, Select Decisions of 1911, No. 4, referred to.

Hadi Hasan Khan v. Pati Ram 200

SECTION 11 ET SEQQ—*Occupancy holding—Mahant—Mahant capable of acquiring occupancy rights for the benefit of the math which he represents.* Held that the mahant of a math, just as much as any other tenant who holds for his own personal benefit, can acquire occupancy rights under the provisions of the Agra Tenancy Act, 1901, for the benefit of the math which he represents.

Parmanand Singh v. Mahant Ramanand Gir 474

SECTION 20—*Occupancy holding—Mortgage—Sub-mortgage by mortgagee of occupancy holding—Rights of sub-mortgagee.* Where the usufructuary mortgagee of an occupancy holding purported to sub-mortgage his mortgagee rights, it was held that the sub-mortgagees were entitled to a money decree against their sub-mortgagor for the money advanced by them.

Balgobind Bhagat v. Nayina Misir 405

ACTS (LOCAL)—1901—II (AGRA TENANCY ACT), SECTIONS 28, 29, 30 AND 34—*Expropriary tenant—Mortgagee from expropriary tenant holding over after ejectment of mortgagor—Rent not fixed by agreement or by a decree of court—Right of zamindar to recover rent.*] G. and H. were zamindars who owned some sir land and occupancy holding. They executed a usufructuary mortgage of their sir land and occupancy holding in favour of K. and the predecessor of J. In execution of a money decree against G. and H. their zamindari rights were sold and P. purchased the same. Subsequently, in execution of a decree for arrears of rent, P. got G. and H. ejected by the Revenue Court. Later on P. got K. and J. the mortgagees also ejected by the Revenue Court. P. then brought a suit against K. and J. for arrears of rent for the period between the ejectment of G. and H. and their own ejectment.

Held that P. was not entitled to recover the rent in regard to the period of time between the two ejectments as the rent had not been fixed either by agreement between the parties or by a decree of court.

Kamta Prasad v. Panua Lal

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SECTION 34—*Defendant in possession of land without consent of owner—Ejectment of defendant through Revenue Court—Subsequent suit for rent—Cause of action—Misjoinder of causes of action—Civil Procedure Code (1908), order II, rule 2.*] On a partition of certain revenue-paying property some land which fell to the plaintiff's share remained in possession of the defendant, who refused to vacate it. The plaintiff sued the defendant for ejectment in the Revenue Court. The defendant pleaded that he was an ex-proprietary tenant, but the Court held him to be a non-occupancy tenant and ejected him. The plaintiff then brought the present suit under section 34 of the Agra Tenancy Act, 1901, for rent of the land held by the defendant during the period prior to his ejectment as land occupied by the defendant without the plaintiff's consent.

Held, that the defendant, being in occupation of the land without the consent of the plaintiff, was liable to pay rent therefor, under section 34 of the Agra Tenancy Act, and further that the claim could be maintained notwithstanding that the defendant was not in possession at the date of the suit. *Sheo Gopal Pande v. Thakur Baldeo Singh*, 8 A. L. J., 1087, distinguished.

Held further; that the suit was not barred by reason of the plaintiff having in his previous suit for ejectment treated the defendant as a tenant.

Held also, that the plaintiff's cause of action under section 34 of the Agra Tenancy Act was no part of his cause of action to recover possession of the property, and could not be joined in the previous suit, and the present suit was, therefore, not barred by the provisions of the Code of Civil Procedure, order II, rule 2.

Nandan Singh v. Ganga Prasad

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SECTIONS 58 AND 200—*Appeal—Question of proprietary title—Defendants setting up a title as mortgagees of the proprietary rights.*] In a suit for ejectment under section 58 of the Agra Tenancy Act, 1901, the defendants pleaded that they were not tenants but mortgagees of the proprietary rights of which the plaintiff was alleged to be the purchaser of the equity of redemption. *Held* that this amounted to a distinct claiming of a proprietary title or at least of a portion of the bundle of rights which go to make up a proprietary title and the appeal would lie to the District Judge.

Kalyan Mal v. Samand

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ACTS (LOCAL)—1901—II (AGRA TENANCY ACT), SECTIONS 79 AND 95
—*Jurisdiction—Landholder and tenant—Occupancy holding—Suit for declaration that plaintiff is heir of deceased occupancy tenant and for possession of holding—Practice—Useless declaration refused.* The son of a deceased occupancy tenant filed a suit against the zamindar in the civil court (1) to have it declared that he was the son and lawful heir of the late tenant and (2) for possession of the occupancy holding held by him. The plaintiff had been ejected more than two years before suit.

Held that, although so far as the first relief claimed was concerned the suit might be cognizable by a civil court, so far as the second relief was concerned the plaintiff's remedy was by suit under section 79 of the Agra Tenancy Act, and, inasmuch as the time for filing such a suit had long since expired, there was no object to be gained by granting the first relief. The entire suit was accordingly dismissed. *Dori Lal v. Sardar Singh*, 5 A. L. J., 514, referred to

Birham Khushal v. Sumera 299

SECTION 95—*Civil and Revenue Courts—Jurisdiction—Dispute between two rival claimants to a tenancy.* *Held* that the question of title to a tenancy arising between rival claimants to that tenancy is a question which is cognizable by a civil court and is not a matter coming within the purview of section 95 of the Agra Tenancy Act, 1901. *Bhup v. Ram Lal*, I. L. R., 33 All., 795, followed. *Zubeda Bibi v. Sheo Charan*, I. L. R., 22 All., 83, and *Hamid Ali Shah v. Wilayat Ali*, I. L. R., 22 All., 93, referred to.

Jagan Nath v. Ajudhia Singh 14

SECTION 199—*Civil and Revenue Court—Jurisdiction—Appeal—Question of proprietary right.* The plaintiff sued in the Revenue Court to eject the defendant alleging that the land in suit was his occupancy holding and that the defendant was his sub-tenant. His occupancy pleaded that he was a co-sharer in the village and that the land in suit was his *khud-kasht*. *Held* that no question of proprietary title was raised by the pleading, and that no appeal, therefore, lay to the District Judge from the order of the Assistant Collector who had decided the case in the first instance. *Dal Chand v. Shamla*, 2 A. L. J., 176, dissented from.

Udit Tiwari v. Bihari Pande 521

1901—III (UNITED PROVINCES LAND REVENUE ACT),
SECTION 107, *See* Act No. IV of 1893, sections 1, 2 and 3 .. 387

SECTIONS 107 AND 111—*Partition—Joint Hindu family—Claim for partition by widow in possession in lieu of maintenance merely, though recorded solatii causa, as a co-sharer.* *Held* that the widow of a member of a Hindu family who is in possession of a portion of the family property under a family arrangement, in lieu of maintenance merely, is not a co-sharer and cannot in virtue of such possession enforce a claim for partition of the share of which she is in possession, even though her name may be recorded *solatii causa* as a co-sharer. *Kailashi Kuar v. Badri Prasad*, S. A. No. 344 of 1913, decided 17th July, 1913, and *Bhoop Singh v. Phool Kowar*, N. W. P., H. C. Rep., 368, and *Jhunna Kuar v. Chain Sukh*, I. L. R., 3 All., 400, followed. *Bhopat Singh v. Mohan Singh*, I. L. R., 19 All., 324, referred to. *Habibullah v. Musammat Kushimba*, 3 A. L. J., 481, distinguished.

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ACTS (LOCAL)—1901—III. (UNITED PROVINCES LAND REVENUE ACT), SECTIONS 107, 111 AND 112—*Partition—Joint Hindu family—Hindu widow. Claim for partition by widow in possession in lieu of maintenance merely, though recorded, solatii causâ, as a co-sharer.* Held that the widow of a member of a joint Hindu family who is in possession of a portion of the family property under a family arrangement, in lieu of maintenance merely, is not a co-sharer and cannot in virtue of such possession enforce a claim for partition of the share of which she is so in possession, even though her name may be recorded, *solatii causâ*, as a co-sharer. *Bhoop Singh v. Phool Kower*, N-W. P., H. C. Rep., p. 868 and *Jhuma Kuar v. Chain Sukh*, I. L. R., 3 All., 400, referred to.

Kailashi Kunwar v. Badri Prasad 548

SECTIONS 111, 112 and 233 (k)—*Partition—Hindu law—Joint Hindu family—Minor—No necessity for minor to be specially represented in partition proceedings.* Where a partition of the property of a joint Hindu family in which one of the members was a minor was found to have been properly carried out with due regard to the interests of the minor, it was held to be no ground for upsetting the partition were such a course possible having regard to section 233 (k) of the United Provinces Land Revenue Act, 1901, that the minor was not represented in the partition proceedings by formally appointed guardian. In such circumstances a minor member of the family is suitably represented by the managing member or members.

Bhagwati Prasad v. Bhagwati Prasad 126

SECTION 121—*Plaintiff referred to Civil Court—Suit filed within time but subsequently withdrawn—Second suit filed after prescribed period.* Where a Revenue Court acting under section 111 of the United Provinces Land Revenue Act, 1901, required a party to the case before it to institute a suit in the Civil Court within three months, and the plaintiff did so, but for some technical reason had to withdraw it with permission to bring a fresh suit, which was in fact filed without delay, but after the three months had expired: held that the second suit must be considered to be a continuation of the first suit, and it could not, therefore, be held that the plaintiff had not complied with the order of the Revenue Court.

Randhir Singh v. Bhagwan Das 541

1910—IV (UNITED PROVINCES EXCISE ACT), SECTION 60—*Unlawful possession of excisable article—Search warrant—Act No X of 1873 (Indian Oaths Act), section 13—Presumption that oath was duly administered.* An excise inspector searched the house of a person suspected to be in illicit possession of an excisable article, namely, cocaine, and cocaine was found in the house.

Held that the subsequent conviction of the person in possession of the said house was not rendered illegal by the fact that the excise inspector had not previously obtained a search warrant.

Emperor v. Allahdad Khan, 11 A. L. J., 442, I. L. R., 35 All., 358, *Emperor v. Hargovind*, I. L. R., 35 All., 1, referred to.

Held also, that it is a reasonable presumption that an oath has been duly administered to a witness appearing before a court, although the record of the court may contain no reference to that fact.

Emperor v. Sayeed Ahmad 575

SECTION 63—*Criminal Procedure Code, section 537—Unlawful possession of excisable article—Search warrant—Conviction not invalidated owing to absence of warrant.* Where the superintendent of police and the sub-inspector searched the house of a person suspected of being in illicit possession of excisable articles and such articles were

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| found in the house searched, it was <i>held</i> that the conviction of the owner of the house under section 63 of the United Provinces Excise Act, 1910, was not rendered invalid by the fact that no warrant had been issued for the search, although it was presumably the intention of the Legislature that in a case under section 63, where it was necessary to search a house, a search warrant should be obtained beforehand. | |
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| ARBITRATION— <i>Award</i> — <i>Party to the suit not made party to the submission to arbitration—Party so omitted not a necessary party to the suit.</i> <i>Held</i> that an arbitration and an award made in the course of a suit would not be rendered invalid by the mere fact that a party whose name was in the record, but who was not a necessary party to the suit, was not made a party to the arbitration proceedings. | |
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CIVIL AND REVENUE COURTS—Jurisdiction—Occupancy holding—Usufructuary mortgage—Ejectment of mortgagee—Suit by mortgagee for declaration that surrender was not binding on him.] An occupancy tenant who had made usufructuary mortgage of his holding then proceeded to surrender the holding to the zamindar, who had the mortgagee ejected by the Revenue Court.

Held, on suit by the mortgagee for a declaration that the surrender of his holding by the mortgagor was not binding on him, that no such suit would lie in the face of the ejectment proceedings in the Revenue Court which were binding on the parties. *Ram Devi Kuari v. Bhudeni Upadhya*, 8. A. L. J., 940, followed.

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CIVIL PROCEDURE CODE (1882), CHAPTER XX—In olvency—In olvent discharged without a schedule of debts being framed—Attempt on the part of a creditor to proceed against after-acquired property.] Where an insolvent had taken advantage of the provisions of chapter XX of Code of Civil Procedure, 1882, and had been discharged under section 351, but no schedule of debts had been framed, it was *held* that a judgement-creditor of the insolvent could not thereafter have recourse against property which had come into the hands of the insolvent subsequently to his discharge.

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| decree—Mortgage on property sold notified at time of sale—Subsequent suit on mortgage—Auction purchaser not estopped from questioning validity of mortgage.] In proceedings in execution of a decree a person alleging himself to be the mortgagee of property about to be sold asked the executing court to notify the existence of his prior incumbrance on the property to be sold, and the Court, without apparently making any inquiry as to the genuineness of the mortgage, did so, but did not sell the property subject to the prior incumbrance. The property was sold and purchased by the decree-holder. | |

- Held* on suit by the mortgagee that the decree-holder auction purchaser was not estopped from contesting the validity of the mortgage so notified. *Shib Kunwar Singh v. Sheo Prasad Singh*, I. L. R., 28 All., 418, followed.
- Jairaj Mal v. Radha Kishan* 257
- CIVIL PROCEDURE CODE (1882), SECTION 315—*Execution of decree—Sale in execution—Auction purchaser deprived of property purchased owing to failure of judgment-debtor's title. Suit to recover purchase money—Limitation—Act No. IX of 1908 (Indian Limitation Act), schedule I, articles 62 and 120.* *Held* (1) that an auction purchaser seeking to recover the purchase money paid by him upon the ground that he has been deprived of the property purchased owing to failure of the judgment-debtor's title thereto has no right outside the Code of Civil Procedure, and (2) that the remedy given by the Code of Civil Procedure is not a suit for money had and received, to which article 62 of the first schedule of the Indian Limitation Act, 1908, would apply, but is a suit falling within the purview of article 120. *Munna Singh v. Gajadhar Singh*, I. L. R., 5 All., 577, and *Mohiuddin Ibrahim v. Mahomed Mura Lewai*, 23 M. L. J., 487, followed. *Ram Kumar Shaha v. Ram Gour Shaha*, 13 C. W. N., 1080, not followed. *Hanuman Kamal v. Hanuman Mandur*, I. L. R., 19 Cal., 123, distinguished.
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- SECTIONS 2, 104, 148—*Pre-emption—Decree in pre-emption suit fixing time for payment—Order extending time—Appeal—“Decree”—“Order”* *Held* that section 148 of the Code of Civil Procedure (1908) does not entitle the court to extend the time fixed by the decree for payment of the purchase money in pre-emption cases.
- Held* also, that an order made under section 148 of the Code of Civil Procedure (1908) is not a decree within the meaning of section 2 of the Code, nor is it appealable as an order under section 104. *Rahima v. Nepal*, I. L. R., 14 All., 420, distinguished.
- Suranjan Singh v. Ram Bahal Lal* 582
-
- SECTION 11—*Res judicata—Prior and subsequent mortgagees—Suit by first mortgagee impleading second but no decree as to rights of first mortgagee—Suit for sale by prior mortgagee not barred.* A second mortgagee brought a suit for sale on his mortgage, in which he impleaded the first mortgagee and asked to redeem. The first mortgagee did not appear. The plaintiff got a decree for sale, but the decree did not either give him redemption of the first mortgagee or direct the property to be sold subject to the first mortgagee. *Held* that the first mortgagee was not precluded from subsequently bringing a suit for sale on his mortgage. *Srinivasa Rao Saheb v. Yamunabhai Ammall*, I. L. R., 29 Mad., 84, *Katchalai Mudali v. Kuppanna Mudali*, M. W. N., 1912, p. 41, followed. *Sri Gopal v. Purthi Singh*, I. L. R., 24 All., 429, *Nattu Krishnama Chariar v. Annangara Chariar*, I. L. R., 30 Mad., 353, and *Gopal Lal v. Benarasi Pershad Chowdhry*, I. L. R., 31 Cal., 428, distinguished.
- Ajudhia Pande v. Inayat-ullah* 111
-
- SECTION 11—*Res judicata—Two suits, one judgement and two decrees—Two appeals, one of which abates before the other is heard.* A plaintiff instituted, on the same day and in the same court, two suits, in each of which the claim was

for a declaration that he was the mahant of a certain *math*. The one was against defendant *A* only, the other against defendants *A* and *S*. Both suits were decided by a single judgement, but a separate decree was framed in each. In the former suit *A* appealed. In the latter *S* appealed, but *A* did not. Pending *A*'s appeal *S* died and his appeal abated and judgement in the case became final. Held that the hearing of *A*'s appeal was barred. *Zaharia v Debia*, I. L. R., 33 All., 51, followed.

Anant Das v. Udai Bhan Pargas

CIVIL PROCEDURE CODE (1908), SECTION 47—*Execution of decree—Partition—Objection that decree-holders had realized certain debts assigned by the decree to the judgement-debtors—Procedure.*] The decree in a partition suit, *inter alia*, allotted a sum of money to be paid by the judgement-debtor to the decree-holders and assigned certain debts on account books to the judgement-debtor. On application by the decree-holders for execution as to the sum allotted to them, the judgement-debtor took objection that the decree-holders had as a matter of fact realized a large amount out of the debts which had been assigned by the decree to him. Held that the question thus raised was not a matter falling within the purview of section 47 of the Code of Civil Procedure, and that the judgement-debtor's remedy was by a separate suit to recover from the decree-holders the amount alleged to have been illegally realized.

Mohan Lal v. Jagau Nath

SECTION 60 (c)—*Execution of decree—Attachment—Objection that attached property is the house of an agriculturist—Jndgement-debtor both zamindar and agriculturist—Burden of proof.*] Where a judgement-debtor whose house was attached in execution of a decree took objection that the house was the house of an agriculturist to which section 60 (c) of the Code of Civil Procedure applied and was not susceptible of attachment, and it was found that the judgement-debtor was both an agriculturist and a zamindar. Held, that it lay on the judgement-debtor to prove that the house was strictly of the nature contemplated by the provisions of section 60 (c).

Jamna Prasad & aut v. Raghunath Prasad

SECTION 66—*Execution of decree—Claim against certified purchaser, but not by representative of the real purchaser.*] The widow of one Bhola Nath purchased a house at a civil court auction sale in the name of her son-in-law Baldeo and incorporated it into another house left by her husband who had died sonless. On her death one of her daughters inherited the house as an heir of her deceased father. The son-in-law whose name the house was purchased raised the plea that he was a certified auction purchaser and the suit was barred by section 66 of the Code of Civil Procedure. Held that as the plaintiff did not sue through the widow, but through the widow's husband, her suit did not come within the purview of section 66 of the Code of Civil Procedure. *Rami Narain v. Mohania*, I. L. R., 28 All., 82, distinguished.

Narain Dei v. Durga Dei

SECTION 92—*Waqf—Suit for declaration of plaintiff's rights as mutawalli and for possession—Jurisdiction.*] Where the plaintiff came into court alleging that he was the last *mutawalli* of a certain *waqf* and that the defendant, on death of the last incumbent, had wrongfully taken possession of the property, and asking to be put into possession thereof as *mutawalli*, it was held that this was not a suit which fell within the scope of section 92 of the Code of Civil Procedure and was properly

filed in the court of a Subordinate Judge. *Budree Das Mukim v. Chooni Lal Johurry*, I. L. R., 33 Calc., 789, and *Ghelabhai Gaurishankar v. Uderam Icharam*, I. L. R., 36 Bom., 29, referred to. *Muhammad Ibrahim Khan v. Ahmad Saiyid Khan*, I. L. R., 32 All., 503, and *Said Ali v. Ali Jan*, I. L. R., 35 All., 98, distinguished.

Muhammad Abdul Majid Khan v. Ahmad Said Khan .. 459

CIVIL PROCEDURE CODE (1908), SECTION 92 (1)—*Procedure—Muhammadan law—Waqf—Trust for a public purpose of a religious or charitable nature.*] Where a trust is a trust created for a public purpose of a religious or charitable nature (in this case a *waqf* under the Muhammadan law) no suit can be maintained for the removal of a duly appointed trustee, save in conformity with the provisions of section 92, sub-section (1), of the Code of Civil Procedure.

Saiyid Ali v. Ali Jan 98

SECTION 98, *See* Minor 478

SECTION 110—*Appeal to His Majesty in Council—Requirements to be fulfilled before grant of a certificate—Decree involving some question respecting property of the value of ten thousand rupees or upward.*] The value of the subject-matter of the suit in the court of first instance was over Rs. 10,000, but the value of the subject-matter in dispute on appeal to His Majesty in Council was less than Rs. 10,000. On the other hand, the proposed appeal to His Majesty in Council necessarily involved a decision as to the validity of an award which dealt with property of far greater value and which had been declared by the High Court to be invalid.

Held that the provisions of section 110 of the Code of Civil Procedure applied and a certificate should be granted. It was not necessary that at the time of presenting the application for leave to appeal there should be pending in a court a dispute respecting other property of the value of Rs. 10,000. *Macfarlane v. Leclaire*, 15 Moo. P. C., 181, *Musammal Aliman v. Musammal Hasila*, 1 C. W. N., 93 (Notes) xciii, and *Anand Chandra Bose v. Broughton*, 9 B. L. R., 423, referred to.

Sri Kishan-Lal v. Kashmiro 445

ORDER I, RULE 8, *See* Muhammadan Law 197

ORDER II, RULE 2, *See* Act (Local) No. II of 1901, section 34 512

ORDER V, RULES 1 AND 2; ORDER IX, RULE 13—*Ex parte decree—Appearance of defendant in answer to a preliminary application not equivalent to appearance in answer to the plaint.*] *Held* that the fact that before the admission of a suit one of the proposed defendants had appeared by pleader on a miscellaneous application for his appointment as guardian *ad litem* to a minor defendant, did not absolve the court from the necessity of serving such defendant, when the suit was admitted, with a copy of the plaint and notice of the date fixed for hearing.

Gulab Chand v. Shankar Lal 163

ORDER V, RULE 15—*Summons—Question of sufficiency of service of summons*] The summons in a suit was served on the paternal uncle of the defendant, who was a member of the same joint family and lived in the same house with the defendant.

Held, that such service was in sufficient in the absence of evidence that the defendant himself could not be found.

Makhan Das v. Mannu Lal 556

CIVIL PROCEDURE CODE (1908), ORDER VIII, RULE 6—*Set-off—Claim barred according to the lex fori but not according to the lex loci contractus.*] In a suit filed against him in the United Provinces the defendant claimed to set off a debt, which, though it would have been barred by limitation in the United Provinces, was not barred according to the local law (that of the Punjab) applicable thereto. *Held* that the set off claimed was admissible.

Bachchan Lal v. Banarsi Das

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ORDER IX, RULE 8—*Appeal—Dismissal for non-appearance of appellant—Appellant present but unrepresented and unable to argue the appeal himself—Procedure.*] On the date fixed for the hearing of an appeal one of the two appellants, the other being a woman, appeared before the court and applied for an adjournment to enable him to procure the attendance of his pleaders. He was called on to argue his appeal, but he said he had nothing to say, and thereupon the appeal was dismissed on the ground that it had not been supported. *Held* that in these circumstances the court was not justified in dismissing the appeal for want of prosecution, but was bound to consider the grounds of appeal and to decide the case on the merits.

Baldeo Prasad v. Kunwar Bahadur]

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ORDER IX, RULES 8 AND 9; ORDER XXII, RULES 3 AND 9.—*Non-appearance of plaintiff—Dismissal of suit—Order setting aside dismissal when plaintiff was found to have been dead at the time suit was dismissed—Orders and rules applicable only to defaulters wrongly applied in case of dead party.*] On the non-appearance of the plaintiff in a suit against the respondent an order was made on the 4th of July, 1911, dismissing the suit for default. The plaintiff was in fact dead at the time the order was made, and his son the appellant was engaged in performing his father's funeral ceremonies and was unable to attend court. These facts were brought to the notice of the Deputy Commissioner in an application made under order XXII, rules 3 and 9, of the Civil Procedure Code, Act V of 1908, by the appellant as the heir and legal representative of the plaintiff, which was filed and accepted by the Deputy Commissioner within the time allowed by law and an order was made on the 11th of September setting aside the dismissal of the suit, and substituting the name of the appellant on the record in place of the deceased plaintiff. On an application for revision of the Deputy Commissioner's order of the 11th of September made by the respondent under section 115 of the Code to the Court of the Judicial Commissioner, that Court reversed the order, and confirmed that decision on review, mainly on the grounds that the order of the 4th of July dismissing the suit was a proper order under order IX, rule 8, of the Code; that the appellant's application to set aside that order was not within time and was therefore barred; and that order XXII, rule 3, of the Code applied only to a still pending suit, and not to one that had been dismissed.

Held (reversing the decisions of the Court of the Judicial Commissioner) that these decisions were vitiated by applying to a dead man orders and rules applicable only to mere defaulter. An "abuse of the process of the Court" within the meaning of section 151 of the Code had occurred by the course adopted in the Judicial Commissioner's Court. Quite apart from that section any Court might rightly have considered itself to possess, inherent power to rectify the mistake inadvertently made in dismissing the suit. The order of the Deputy Commissioner setting aside the dismissal was manifestly sensible and correct, and their Lordships restored it, and remitted the case to India to be disposed of on the merits.

Debi Bakhsh Singh v. Habib Shah

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CIVIL PROCEDURE CODE: (1908), ORDER XX, RULE 2.—Judgment—
Judgment written by the judge who heard the case after his transfer from the district and pronounced by his successor in office. A Judge may pronounce a judgment written but not pronounced by his predecessor in office, and there is no standing that at the time the judgment was written the Judge who wrote it had ceased to be the Judge of the court in which the case was tried. *Ganeshji Nath Day Chaudhary v. Kastura Nandan Chaudhary*, I. L. R., 32 Cal., 766, 6 H. 101.

Basant Bahari Ghoshal v. The Secretary of State for India in Council

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ORDER XX, RULE 19—*Partition—*
Appeal—Preliminary decree—Subsequent interlocutory order giving directions for preparation of final decree. In a suit for partition a preliminary decree was passed and an appeal taken. When the case went back to the court of first instance for the passing of a final decree that court passed an order directing that actual partition should be made in accordance with certain directions then given by it. *Held* that no appeal would lie against such an order, but its propriety could be questioned in appeal in the final decree. The Code of Civil Procedure contemplated the preparation of only one preliminary decree, and the order in question could not be regarded as more than an interlocutory or for execution; directions as to the preparation of the final decree.

Bharat Indu v. Yakub Hasan

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ORDER XXI, RULE 2; ORDER XXXIV, RULE 5, See Execution of decree

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ORDER XXI, RULE 16—*Execution of decree—Decree for payment of sum of money—Transfer of decree as to costs merely.* *Held* that a decree for payment of a sum of money and for costs of the suit is one and indivisible, and the decree-holder cannot transfer the decree so far merely as it may be a decree for costs, retaining the right to execute the decree for the main sum awarded.

Ram Chandra Naik Kalia v. Abdul Hakim

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ORDER XXI, RULES 84, 89, 92—*Execution of decrees—Sale of immovable property—Acceptance of final bid deferred—Application to set aside sale—Limitation.* *Held* that a sale of immovable property in execution of a decree is not complete until the sale officer has accepted the final bid and the purchaser has paid in the deposit of 25 per cent. of the purchase money required by rule 84 of order XXI of the Code of Civil Procedure, 1908. The period of thirty days prescribed by rule 92 will not, therefore, begin to run against a person applying under rule 89 if for any reason the final bid remains for a time unaccepted by the sale officer.

Munshi Lal v. Ram Narain

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ORDER XXI, RULE 88—*Execution of decrees—Sale in execution—Pre-emption—Title of pre-emptor defeasible.* *Held* that a title to a share in undivided immovable property sold in execution of a decree which is still defeasible at the date of a sale in execution is not sufficient to support a claim for pre-emption under order XXI, rule 89, of the Code of Civil Procedure, 1908. *Kamta Prasad v. Mohan Bhagat*, I. L. R., 32 All., 45, and *Nabihan Bibi v. Kaulashar Rai*, 4 A. L. J., 351, followed.

Abdul Ghafur v. Ghulam Husain

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ORDER XXXIV, RULE 1; ORDER I, RULE 9—*Parties of suit—Mortgage—Joint mortgage of separate properties—Suit barred as against one mortgagee—Remaining property*

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| CIVIL PROCEDURE CODE (1908), ORDER XXIX, RULE 1; ORDER XLIII, RULE 1— <i>Temporary injunction—Order refusing injunction—Appeal.</i>] <i>Held</i> that an appeal lies from an order refusing, as well as from one granting, a temporary injunction. | |
| Lachmi Narain v. Ram Charan Das.. .. | 425 |
| ORDER XLI, RULE 23; ORDER XLIII, RULE 1(u)— <i>Suit dismissed for default of appearance, but restored by appellate court—Remand—Appeal.</i>] <i>Held</i> , that no appeal would lie from an appellate order directing that a suit, which had been dismissed because neither party had appeared, should be restored to the file of pending cases and heard | |
| Wahid-un-nissa v. Kundan Lal | 427 |
| CLERK, <i>See</i> Master and servant | 132 |
| COMPANY— <i>Winding up—Shares applied for subject to a condition, and partly paid for—Condition not fulfilled—Resolution of company to refund part payment—Position of applicant as regards winding up proceedings.</i>] A company started in Meerut in 1904, with objects of a very general nature, proposed in 1906 to erect a mill at Fyzabad, and accordingly issued a prospectus and invited the public to subscribe the necessary capital. On the faith of this prospectus one M. applied for shares, but added to his application a condition to the following effect:—"These shares are only subscribed on the condition that any mill is started in the suburbs of Fyzabad." The company, however, found that they could not raise the necessary funds to start a mill at Fyzabad, and therefore passed a resolution that the money already subscribed for that purpose should be refunded. But before this was done the company went into liquidation. | |
| <i>Held</i> that M. was in the circumstances not a member of the company, but a creditor and entitled to get back what he had already paid. | |
| Mahendra Gopal Mukerji v. Lachman Prasad | 538 |
| COMPENSATION for land compulsorily acquired, <i>See</i> Act No. I of 1894, section 80 | 9 |
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| — <i>See</i> Criminal Procedure Code, sections 4 and 195 (1) | 8 |
| — <i>See</i> Criminal Procedure Code, sections 203, 437 | 78 |
| COMPROMISE, <i>See</i> Hindu law | 240, 428 |
| — <i>See</i> Sale | 168 |
| CONFESSION, <i>See</i> Act No. I of 1872, section 91.. .. | 257 |
| CONSIDERATION, <i>See</i> Act No. I of 1872, section 92 | 558 |
| CONTRACT— <i>Sale—Goods sent to purchaser not in accordance with terms of contract—Purchaser not bound to return goods to vendor.</i>] When goods sent to a purchaser, professedly in execution of a contract of sale are not of the kind which the vendor had agreed to supply, it is not the duty of the purchaser to see that such goods are returned to the vendor; it is enough if he gives notice to the vendor that the goods are lying at the place to which they were sent at the vendor's risk. <i>Grimoldby v. Wells</i> , L. R. 10 C. P., 391, followed. | |
| Phaggu Mal v. Babu Lal | 325 |
| — <i>See</i> Act No. XIII of 1859 | 143 |
| — <i>See</i> Master and servant | 132 |
| CONSTRUCTION OF DOCUMENT, <i>See</i> Hindu law | 337 |
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| CRIMINAL PROCEDURE CODE, SECTIONS 4 AND 195 (1)—“ <i>Complaint</i> ”— <i>Information of the supposed commission of an offence communicated by the District Judge to the District Magistrate with a view to the latter taking action as a magistrate.</i>] A Munsif, being of opinion that a document filed in a case before him had been tampered with, communicated his suspicions to the District Judge, who thereupon wrote to the District Magistrate, requesting him to take action in the matter. <i>Held</i> that the letter of the District Judge to the District Magistrate amounted to a complaint within the meaning of section 195 (c) of the Code of Criminal Procedure. <i>Emperor v. Sundar Sarup</i> , I. L. R., 26 All., 514, followed. | |
| Emperor v. Debi Prasad | 8 |
| ————— SECTIONS 35 AND 408— <i>Appeal</i> —“ <i>6 Aggregate sentences</i> ”— <i>Concurrent sentences not aggregate.</i>] <i>Held</i> that the term “aggregate sentences” as used in sub-section (3) of section 35 of the Code of Criminal Procedure applies only to consecutive and not to concurrent sentences. Where therefore an Assistant Sessions Judge passes concurrent sentences and the whole term to be served by the convict does not exceed four years, the appeal under section 408 of the Code does not lie to the High Court but to the Sessions Judge. <i>Sher Mohammad v. Emperor of India</i> , Punj. Rec., 1901, Case 85, <i>Emperor v. Tulshidas Lakshman</i> , 11 Bom. L. R., 544, and <i>Regina v. Gulam Abbas</i> , 12 Bom. H. O. R., 147, approved and followed. <i>Abdul Khalek v. King-Emperor</i> , 17 C. W. N., 72, dissented from. | |
| Emperor v. Tulshi Ram | 154 |
| ————— SECTIONS 55, 56 AND 110— <i>Arrest of suspected person—Warrant—Procedure.</i>] Section 55 of the Code of Criminal Procedure is independent of Chapter VIII of the Code, although proceedings under that chapter may follow an arrest under section 55 as a natural sequence. An officer in charge of a police station can, therefore, arrest or cause to be arrested, without a warrant or an order of a Magistrate, any person who is by repute an habitual robber, housebreaker or thief or otherwise comes within the scope of section 110. | |
| Emperor v. Nepal | 407 |
| ————— SECTION 125— <i>Security to keep the peace—Procedure—Appeal—Jurisdiction.</i>] A District Magistrate taking action under section 125 of the Code of Criminal Procedure cannot treat an application made under that section as an appeal and reverse the order of a first class Magistrate on the facts. If he considers the order to be wrong on the merits he can exercise his revisional powers and submit the record to the High Court; but the cancellation of bonds contemplated by section 125 can only be on the ground that the bonds are no longer necessary. | |
| Benarsi Das v. Partab Singh | 103 |
| ————— SECTION 179— <i>Jurisdiction—Place where consequence of act ensues—Act No. XLV of 1860 (Indian</i> | |

Penal Code), section 406—*Criminal breach of trust.*] *Held* that the loss caused to the person beneficially entitled to property through a criminal breach of trust is a consequence which completes the offence, and a prosecution will therefore lie at the place where such loss occurred.

Queen Empress v O'Brien, I. L. R., 19 All., 111. *Emperor v. Mahadeo*, I. L. R., 32 All., 377, followed. *Babu Lal v. Ghansham Das*, Weekly Notes, 1908, p. 115, *Ganeshi Lal v. Nand Kishore*, I. L. R., 34 All., 487, and *Sirdar Meru v. Jethabhai Amirbhai*, 8 Bom. L. R., 513, distinguished. *Nirbhe Ram v. Kallu Ram*, 4 O. C., 376, dissented from.

Langridge v Atkins 29

CRIMINAL PROCEDURE CODE; SECTION 195, CLAUSES (b) AND (c) *Sanction to prosecute—Power of appellate court to grant sanction—Appeal—Revision.*] *Held* that the appellate court, equally with the court of first instance, has power to grant sanction for a prosecution in respect of a document filed or evidence recorded in the suit.

Held, also, that petition under section 195 (6) of the Code of Criminal Procedure seeking the cancelment of an order under section 195 (1) should be classed as a criminal appeal.

Bhadeswar Tiwari v Kamta Prasad 90

—SECTIONS 203, 437 — *Complaint summarily rejected—Further inquiry—Notice to person complained against not necessary.*] A notice to a person against whom a complaint is made is quite unnecessary where it is sought to set aside the summary order rejecting the complaint in a proceeding to which he was actually no party.

Angan v. Ram Pirbhan 78

—SECTION 260, *See* Act No. VI of 1882, section 74 173

—SECTION 284—*Assessors—Trial with only one duly appointed assessor—Trial illegal.*] Of two assessors assisting the Sessions Judge in the trial of a sessions case, one only had been duly summoned to act as an assessor in that case. The other was a gentleman of some position who had formerly been on the list of assessors but had been exempted on the recommendation of the District Magistrate. *Held* that in these circumstances there was no lawful trial before a lawfully constituted tribunal, and that a new trial must be ordered. *Queen Empress v. Badri*, Weekly Notes, 1894, p. 201, followed.

Emperor v. Man Singh 570

—SECTIONS 364 AND 533, *See* Act No. I of 1872, section 91 260

—SECTION 439—*Revision—Powers of High Court—District Registrar*] A District Registrar is not a court subordinate to the High Court either on the civil, criminal or revenue side, and the High Court has no power to interfere with the order of the Registrar impounding a document and calling upon the applicants to show cause why they should not be prosecuted for forgery.

Emperor v. Udit Narayan Dube 109

—SECTIONS 517 AND 520.—*Appeal—Jurisdiction—Power of appellate court to pass orders regarding property in respect of which an offence has been committed.*] *Held* that section 520 of the Code of Criminal Procedure gives to an appellate court the same power as the court which originally tried a case to pass orders under section 517 of the Code. *Baloram Gogai v. Chintaram Kohla*,

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| I. L. R., 6 Cal., 268, <i>Nawal Kunwar v. Bakhtawar Singh</i> , 10 A. L. J., 390, and <i>Abdul Majid v. Mahbub Ali</i> , F. A. No. 129 of 1911, followed. <i>Manohar Singh v. Sumirta Kuar</i> , I. L. R., 17 All., 428, not followed, <i>Bisheshwar Dyal v. Harbans Sahoy</i> , 6 C. L. J., 659, <i>Ghurphakni v. Purnmeshwar Dayal</i> , 35 C. L. J., 653, and <i>Rahim Jan Bibi v. Imam Jan</i> , 14 C. L. J., 173, doubted. | |
| Bihari Lal v Makhdum Bakhsh | 194 |
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| EXCISABLE ARTICLE, <i>See</i> Act (Local) No. IV of 1910, section 60 .. | 575 |
| EXECUTION OF DECREE.— <i>Limitation—Suit for sale on a mortgage—Decree payable by instalments—Civil Procedure Code (1882), section 258—Civil Procedure Code (1902), order XXI, rule 2 : order XXXIV, rule 5—Act No. IX of 1908 (Indian Limitation Act), schedule I, article 181.</i> On a compromise in a suit for sale on a mortgage a decree followed providing that the sum found due on the mortgage Rs. 1,374, with interest at a certain rate, should be paid by instalments of Rs. 100 a year, along with interest then due. Payments were made by the end of Jeth in each year, beginning with the Jeth 1957 Fasli (June, 1900,) and it was provided that, if default were made for three years in succession in the payments and interest, the decree-holder would be at liberty to recover at once the whole amount payable under the decree, that is, to apply for an order absolute for sale and execute the same. No payment was made in 1900 or 1901, but in June, 1902, just before the end of Jeth 1959 Fasli the judgment-debtor paid up all that was due on account of the first three years. He made no payment in 1903, but in June, 1904, he paid up all that was due up to the end of Jeth 1960 Fasli (June, 1903). No payment was made in 1905, but in June, 1906, he paid the instalment and interest which he ought to have paid in Jeth 1961 Fasli (June, 1904.) This payment was covered by the proviso to section 20 (1) of the Limitation Act. The only other payment made was a small sum on account of interest in July, 1909. The decree-holder applied for an order absolute for sale on the 3rd of August, 1909. | |
| <i>Held</i> that the first three consecutive defaults were in 1905, 1906 and 1907, and that the decree-holders' application was in time applying article 181 of the first schedule to the Indian Limitation Act, 1908. | |
| The following cases were referred to:— <i>Oudh Behari Lal v. Nageshar Lal</i> , I. L. R., 13, All., 278, <i>Kishan Singh v. Aman Singh</i> , I. L. R., 17 All., 42, <i>Roshan Singh v. Mata Din</i> , I. L. R., 23 All., 86, <i>Chunni Lal v. Harnam Das</i> , I. L. R., 20 All., 302, <i>Shankar Prasad v. Jalpa Prasad</i> , I. L. R., 16 All., 371, <i>Ajudhia v. Kunjal</i> , I. L. R., 30 All., 123, <i>Man Mohun Roy v. Durga Churn Gooee</i> , I. L. R., 15 Cal., 502, and <i>Kashiram v. Pandu</i> , I. L. R., 27 Bom., 1. | |
| Badri Narain v. Kunj Bihari Lal | 178 |
| ————— <i>Stay of execution of decrees under appeal—Jurisdiction—Procedure.</i> <i>Held</i> that the court which passed a decree has no power to stay execution thereof whilst the decree is under appeal; neither has a court which has executed its own decree awarding possession of immovable property power to restore to possession the party whom it has ejected. | |
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| GROVE-LAND, <i>See</i> Act (Local) No. II of 1901, section 4; chapter X | 200 |
| GUARDIAN AD LITEM, <i>See</i> Hindu law | 571 |
| GUARDIAN AND MINOR, <i>See</i> Act No. IX of 1875, section 3 | 150 |
| | 499 |
| HINDU LAW— <i>Adoption—Ahirs—Validity of adoption after marriage of adopted son.</i> Held that amongst Ahirs the adoption of a son after his marriage has taken place is not permissible. <i>Pichuvayyan v. Subbayyan</i> , I. L. R., 13 Mad., 128, followed. | |
| Jhunka Prasad v. Nathu | 263 |

HINDU LAW—*Daughter's estate—Decree for possession of father's estate obtained by daughter—Right of daughter's sons to execute such decree.*
The daughter of a separated Hindu obtained a decree for possession of her father's estate against certain trespassers. Before, however, she could obtain possession, she died and her sons applied for execution. *Held* that the daughter represented her father's estate when she brought her suit for possession and that the persons who succeeded to the estate were entitled to execute the decree which she had obtained.

Mahadeo Singh v. Sheo Karan Singh 481

————— ***Endowment—Right of succession to sebatship of temple belonging to Ballavacharya Gossains—Evidence of dedication—Claim of persons incompetent to be sebaits (as being Bhats) of Ballav temple disallowed as defeating the purpose for which the founder established the worship—Title—Proof of independent title to succession as sebaits.*** In a suit for possession and the right of sebatship of a temple belonging to the Ballavacharya Gossains founded by one Muttuji, the maternal grandfather of the plaintiffs (appellants), the defendant (respondent) contended that the ordinary Hindu law was not applicable as alleged by the plaintiffs, and that daughters' sons were excluded by custom from succession.

Held that, apart from positive testimony on the point, the performance of the worship of the idol in accordance with the rites of the sect for whose benefit it was held, might be treated as good evidence of dedication, and the ordinary rule of Hindu law relating to the descent of private property was not applicable.

Held also that the rule that the heirs of the founder succeeded to the sebatship laid down in *Gossamee Sree Greedharraojee v. Rumanlolljee Gossamee*, I. L. R., 17 Cal., 3; L. R., 16 I. A., 137, was, as there implied, subject to the condition that the devolution in the ordinary line of descent is not inconsistent with or opposed to the purpose the founder had in view in establishing the worship. In the present case the appellants being Bhats, and not belonging to the Gossain *kul*, were not competent to be sebaits of a Ballav temple where the rites were performed according the Ballav ritual, which, it was clearly established, they could not perform. To allow their claim would defeat the purpose for which the worship was established.

Held further, that the respondent had established an independent title of his own to the temple as being the nearest male relative of Muttuji, both being descendants of two full brothers. The idol in the temple was brought from his temple at Nathdwara, and the worship founded by Muttuji was an off-shoot of the worship at Nathdwara. The temple was also built on land belonging to the Tekait respondent with the permission of his ancestor, who held the office of Tekait at the time. He had therefore a clear title according to the customs and usages of the Ballav *kul* to the sebatship of the temple.

Mohan Lalji v. Gordhan Lalji Maharaj 283

————— ***Hindu widow—Compromise followed by an award settling disputes as to the property of various members of the family—Effect of such award on reversionary interests.*** Where the widow of one and the son of the other of two brothers, Hindus separated in estate, entered into a compromise, which was found to be reasonable in its nature, concerning the partition of the property of the two brothers, and an award was made on the basis of such compromise, it was *held* that it was not open to the reversioner to dispute the validity of the compromise and award, especially when a considerable time had elapsed and most of the property had changed hands meanwhile. *Rhunni Lal v. Gobind Krishna Narain*, I. L. R., 33 All., 856, and *Mohan Lal v. Chuttan Singh*, 10 A. L. J., 101, followed.

Bihari Lal v. Daud Husain 240

HINDU LAW—Hindu widow—Powers of alienation possessed by a Hindu widow in respect of the property of her husband—Transfer of debt secured by a mortgage.] A Hindu widow in possession as such of property which had been the property of her husband in his life-time can always alienate her life interest in such property and a transfer by her of the corpus of the property without legal necessity and not for a pious purpose is not void but only voidable at the instance of the reversioners.

A Hindu widow, without legal necessity, transferred a mortgage debt and the security therefor, which had been the property of her late husband, to D, who thereafter sued to recover the debt by sale of the mortgaged property. *Held* that the transferee acquired all the rights which the widow had and could exercise during her life-time in respect of the mortgage, one of these being to recover the debt.

Bijoy Gopal Mukerji v. Krishna Mahishi Debi, I. L. R., 34 Cal., 329, referred to.

Durga Kunwar v. Matu Mal 311

Hindu widow—Investments by widow from income of husband's estate—Whether or not such investments become accretions to the husband's estate.] Where immovable property is purchased by a Hindu widow in possession as such of the estate of her late husband out of the income of that estate, such property does not necessarily become an accretion to the husband's estate. The widow has full power to dispose of it during her life-time, and it is only when she manifests during her life-time a clear intention to treat it as an accretion to her husband's estate, or allows it at her death to remain undisposed of, that such property will become part of that estate.

Wahid Ali Khan v. Tori Ram 551

Joint family—Allegation of separation in suit by some members for separate share—Expression of intention to hold share separately not proved—Right to mesne profits on separation—Exclusion from joint family, allegation of—Non-receipt of share of profits of joint property—Voluntary residence not with joint family—Refusal of allowance as being inadequate.] The appellant, a member of a joint undivided Hindu family, brought a suit in 1905 against the respondents, the other members of the family, alleging a separation by him in 1901, when he had expressed his intention to hold his share separately, and claiming possession of his share, with mesne profits.

Held, that what may amount to a separation, or what conduct on the part of some of the members may lead to separation of a joint undivided Hindu family, and convert a joint tenancy into a tenancy in common, must depend on the facts of each case. A definite and unambiguous indication by one member of intention to separate himself and to enjoy his share in severalty may amount to separation but to have that effect the intention must be unequivocal and clearly expressed. Separation from commonsality does not as a necessary consequence effect a division [*Rawan Persad v. Radha Beeby*, 4 Moo. I. A., 137]. A separation in mess and worship may be due to various causes, and yet the family may continue joint in estate.

In this appeal it was held (affirming the decision of the court of the Judicial Commissioner) that on the evidence in, and under the circumstances of, the case and the conduct of the party alleging division of the family there had been no separation in 1901, and the appellant was consequently not entitled to mesne profits on that ground.

He also claimed mesne profits on the ground of exclusion from the joint family, as he had not since 1901 received any share of the

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| profits of the joint property. <i>Held</i> , that although he had not received any of the profits of the joint estate, the evidence was clear that the appellant was offered an allowance from the profits of the joint property which he refused to accept as being inadequate, and that would not amount to exclusion. | Page. |
| Suraj Narain v. Iqbal Narain | 80 |
| HINDU LAW— <i>Joint Hindu family—Execution of decree—Power of managing member to enter up satisfaction of decree on behalf of the family.</i> <i>Held</i> , that the managing member of a joint Hindu family can execute decrees on behalf of the family, and can receive payment and give good receipts on behalf of the family, which will be binding on the family. <i>Hori Lal v. Munman Kunwar</i> , I. L. R., 34 All., 549, followed. <i>Ganga Dayal v. Mani Ram</i> , I. L. R., 31 All., 156, distinguished. | |
| Achhaibar Singh v. Ram Sarup Sahu | 380 |
| Mitakshara— <i>Joint Hindu family—Liability of sons in respect of a mortgage executed by father—Exemption of son's interests—Subsequent suit against the sons—What plaintiff's are entitled to recover.</i> In 1892 a decree was passed on appeal for sale on a mortgage of joint family property against the father of the family. In 1896, the sons, who were not made parties to the original suit, obtained a decree exempting their shares in the family property. In 1897, the share of the father was sold and realized less than half the amount of the decree. In 1910 the mortgagees brought a suit against the sons to recover the balance of the mortgage debt after giving credit for the amount realized by sale in execution of the decree of 1892. | |
| <i>Held</i> , the suit was not barred, but that the plaintiffs could only recover the unsatisfied portion of the decree of 1892 together with future interest as allowed by that decree. They could not treat the suit as an ordinary mortgage suit, merely giving credit for the amount realized under the decree of 1892, nor could they claim interest at the contractual rate on the unpaid amount of the decree. | |
| <i>Laohman Das v. Dalu</i> , Weekly Notes, 1900, p. 125, followed. <i>Dharam Singh v. Angan Lal</i> , I. L. R., 31 All., 301, and <i>Ram Singh v. Sobhu Ram</i> , I. L. R., 29 All., 544, referred to. | |
| Jageshar Rai v. Anrut Rai | 302 |
| Joint Hindu family— <i>Mortgage—Suit for cancellation of mortgage executed by managing member—Compromise—Liability of sons.</i> One K, as head of a joint Hindu family, executed in 1905 a usufructuary mortgage of the family property, in which the widow of his deceased brother joined as a co-mortgagor. In 1907 the mortgagors sued for cancellation of this deed, but entered into a compromise with the mortgagee, upon which a decree was passed maintaining the mortgage, but in a modified form. The mortgagee thereafter instituted a suit for enforcement of the mortgage as settled by the compromise decree. | |
| <i>Held</i> that, in view of the fact that the courts below found that the compromise was genuine and for the benefit of the family, it was not open to the defendants to raise the question of the genuineness of the original mortgage, and that, whether or not the original mortgage was a genuine transaction, the compromise decree gave rise to a debt which was binding on the descendants of the original mortgagor K. <i>Madan Lal v. Kishan Singh</i> , I. L. R., 34 All., 572, referred to. | |
| Ram Kuber Pande v. Ram Dasi | 428 |
| Joint Hindu family— <i>Mortgage—Mortgage by two brothers of undivided shares, each assenting to the other's mortgage—Partition—Entries mortgaged property falling to the share of one brother—Effect of partition on rights of mortgagees.</i> Two brothers constituting a joint Hindu family jointly mortgaged in 1879 a ten biswa | |

share in village Chauwar. In 1881, in substitution for this mortgage, each brother mortgaged to the same mortgagee a five biswa undivided share in Chauwar, and each brother also signed the mortgage executed by the other. In 1888 the family property was partitioned and the whole ten biswa of Chauwar fell to the share of one brother.

Held on suit by the son of the mortgagee for sale that the plaintiff was entitled to bring to sale a five biswa share in Chauwar under the mortgage executed by the brother who had lost possession of the village, and not merely to have recourse against such portion of the family property as he had taken in exchange therefor. *Byjnath Lal v. Ramooddeen Chowdry*, L. R., 1 I. A., 106, distinguished.

Sundar Lal v. Brij Lal 548

HINDU LAW—*Joint Hindu family—Mortgage—Guardian ad litem—Suit on mortgage executed by father prior to birth of son—Father appointed son's guardian ad litem.*] *Held* that, inasmuch as an after-born son cannot in a suit on a mortgage made by his father set up the defence of the immoral nature of the debt on account of which the mortgage was executed, it cannot be said that the appointment of the father as guardian *ad litem* in such suit would be necessarily prejudicial to the interests of the son.

Narain Das v. Har Dayal 571

————— *Joint Hindu family—Power of father to bind the family property—Father no power to revive time-barred debt.*] *Held* that the father and manager of a joint Hindu family cannot legally revive a time-barred debt and bind the family property to secure its payment. *Chandra Deo v. Mata Prasad*, I. L. R., 31 All., 176, and *Indar Singh v. Sarju Singh*, 8 A. L. J., 1009, followed.

Dalip Singh v. Kundan Lal 207

————— *Marriage—Marriage of a Hindu girl without force or fraud but without consent of legal guardians—Maxim "factum valet".*] The marriage of a Hindu girl of some 16 years of age was effected by the maternal uncle of the girl. There was no evidence of force or fraud; but the marriage was against the wishes of the paternal relatives of the girl, who desired to make a profit by marrying her to a rich but one-eyed man called Tulshi. *Held* that the case was one to which the doctrine of *factum valet* should be applied, and the marriage was declared to be valid. *Ghazi v. Sukru*, I. L. R., 19 All., 515, *Venkatacharyulu v. Rangacharyulu*, I. L. R., 14 Mad., 316, *Surjyamonni Dasi v. Kali Kamta Das*, I. L. R., 28 Calc., 37, *Mulchand v. Bhudhia*, I. L. R., 22 Bom., 812, and *Khushalchand Lalchand v. Bai Mani*, I. L. R., 11 Bom., 247, referred to.

Kasturi v. Chiranji Lal 265

————— *Partition—Requisites for partition—Agreement to hold property in certain specific and defined shares, effect of—Re-union, failure to prove as alleged.*] The members of a joint Hindu family came to the following agreement—"Now we have already come to terms, and according to the shares given below we have been in possession and enjoyment of our respective shares. As regards it we have with our mutual consent entered into an agreement according to the terms given below. The same share in the property which is in the possession of a particular person as given below shall be considered to be the property of that very person who is in possession thereof. If any of us brings any suit in the Civil or Revenue Court to the effect that his share is less or he is a loser, it shall be considered to be false in every court. By virtue of this agreement no person shall be competent to bring any claim in any court in respect of any portion of the property other than the property detailed below." Then followed a specification of the villages belonging to the family.

and the shares in which those villages were thereafter to be held. From that time the property had been entered in the register in accordance with the arrangement contained in the agreement, and the agreement had been acted upon up to the time of suit

Held by the Judicial Committee (affirming the decision of the High Court) that on the evidence and circumstances of the case, the agreement was one which operated as a partition of shares, and the family thenceforth ceased to be joint in accordance with the principle laid down in *Appovier v. Rama Subba Aiyar*, 11 Moo., I. A., 75, *Balkishan Das v. Ram Narain Sahu*, I. L. R., 30 Cal., 738; L. R., 30 I. A., 139, and *Parbati v. Naunihal Singh*, I. L. R., 31 All., 412; L. R., 36 I. A., 71.

There was no re-union. That was a question of fact, and there was no evidence to show that any of the members of the family re-united, or even contemplated re-union.

Raghubir Singh v. Moti Kunwar 41

HINDU LAW—*Partition—Requisites for partition—Partition created by so-called will in life-time of father dividing family property among his sons and taking no share himself—Double share to eldest son—Unequal partition under alleged custom—Provision for forfeiture on mismanagement or bad behaviour—Conduct of parties after execution of document of partition.*] By a document called a "will" dated the 26th of November, 1895, the father and head of a Hindu joint family governed by the Mitakshara law recorded a division of the ancestral family property amongst his three sons (giving himself no share but allotting a double share to his eldest son). The document recited that, "my three sons are at present fully qualified to conduct the business. Therefore in order to avoid a dispute after my death I have at present, while in a sound state of body and mind and of my own free will and accord, divided the property among my sons, heirs, as follows." Then followed the details of the division. There was provision that, "If I at any time come back from pilgrimages and find mismanagement or character of any one bad then I shall have power to cancel this will which shall be enforced from the date of its execution" and the document concluded as follows—"All the three sons were put in separate possession of the estate in the beginning of the year 1203 Fasli" (September 1885) "I have no other heir having a right besides those mentioned in this will. I have therefore executed this will in order that it may serve as evidence." Mutations of the various shares were subsequently made into the names of those to whom they were separately allotted, and the evidence showed that the division had been assented to, acquiesced in and acted upon by the sons up to 1905. In a suit brought in September, 1905, four years after the father's death, by the two younger sons for partition of the property, which they alleged to be joint and undivided, and of which they claimed to be entitled to two one-third shares.

Held (reversing the decision of the High Court) that the document of the 26th of November, 1895, was not a will but was intended to operate from its date and was in fact a family arrangement contemporaneously made and acted upon by all parties, the effect of which was, under the circumstances of the case, to create a partition of the joint ancestral property. There was nothing in the fact that the document was called a will which invalidated the partition, which was undoubtedly made in fact, and which was acted upon for ten years without any dispute or misunderstanding as to the respective rights of the parties under it.

Held also, that the provision in the will giving the father power to cancel it in certain events, evidenced a contractual condition which the sons accepted in order to obtain the partition, which gave them

immediate possession of the property, and viewed thus the contractual acceptance of a power of forfeiture in case of bad behaviour would not be sufficient to prevent the partition operating *in praesenti*.

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| Brijraj Singh v. Sheodan Singh | 337 |
| HINDU LAW. — <i>Joint Hindu family—Presumptions as to property in the possession of members of a joint family.</i>] Property in the possession of a Joint Hindu family should be presumed to be joint family property until the contrary is shown, even though it may have been acquired in the name of a particular member of the family. | |
| The fact that property stands in the individual name of one or other member of a Joint Hindu family does not of itself give rise to the presumption that it is the separate property of that member. <i>Gurumurthi Reddi v. Gurammal</i> , I. L. R., 32 Mad, 88, <i>Shiv Gulam Singh v. Baran Singh</i> , 1 B. L. R., 164 and <i>Taruck Chunder Totadar v. Joodheshteer Chunder Koondoo</i> , 19 W. R., O. R., 178, referred to. <i>Ram Kishan Das v. Tunda Mat</i> , I. L. R., 33 All., 677, discussed. | |
| Kundan Lal v. Shankar Lal | 564 |
| — <i>Suit for declaration that mortgage by widow did not affect plaintiffs' reversionary rights—Plaintiffs not nearest reversioners—Pleadings.</i>] Where plaintiffs sued as next reversioners for a declaration that a mortgage executed by a Hindu widow was not binding on them, and it was found that as a matter of fact even the nearest of the plaintiffs could only succeed to the estate if four males and one female died in his life-time; it was held that the plaintiffs ought not to have a decree. | |
| Meghu Rai v. Ram Khelawan Rai | 326 |
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HINDU LAW—*Partition—Requisites for partition—Partition created by so-called will in life-time of father dividing family property among his sons and taking no share himself—Double share to eldest son—Unequal partition under alleged custom—Provision for forfeiture on mismanagement or bad behaviour—Conduct of parties after execution of document of partition.*] By a document called a "will" dated the 26th of November, 1895, the father and head of a Hindu joint family governed by the Mitakshara law recorded a division of the ancestral family property amongst his three sons (giving himself no share but allotting a double share to his eldest son). The document recited that, "my three sons are at present fully qualified to conduct the business. Therefore in order to avoid a dispute after my death I have at present, while in a sound state of body and mind and of my own free will and accord, divided the property among my sons, heirs, as follows." Then followed the details of the division. There was provision that, "If I at any time come back from pilgrimages and find mismanagement or character of any one bad then I shall have power to cancel this will which shall be enforced from the date of its execution" and the document concluded as follows—"All the three sons were put in separate possession of the estate in the beginning of the year 1203 Fasli" (September 1885) "I have no other heir having a right besides those mentioned in this will. I have therefore executed this will in order that it may serve as evidence." Mutations of the various shares were subsequently made into the names of those to whom they were separately allotted, and the evidence showed that the division had been assented to, acquiesced in and acted upon by the sons up to 1905. In a suit brought in September, 1905, four years after the father's death, by the two younger sons for partition of the property, which they alleged to be joint and undivided, and of which they claimed to be entitled to two one-third shares.

Held (reversing the decision of the High Court) that the document of the 26th of November, 1895, was not a will but was intended to operate from its date and was in fact a family arrangement contemporaneously made and acted upon by all parties, the effect of which was, under the circumstances of the case, to create a partition of the joint ancestral property. There was nothing in the fact that the document was called a will which invalidated the partition, which was undoubtedly made in fact, and which was acted upon for ten years without any dispute or misunderstanding as to the respective rights of the parties under it.

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| <i>Sis Ram v. Asghar Ali</i> | 19 |
| <i>House in abadi—Well sunk by tenant inside his house—Mandatory injunction—Discretion of court.</i> In this case the High Court refused to grant a mandatory injunction at the suit of the zamindar for the removal of a well recently constructed inside their house by tenants of a house in a town: the position of the tenants being that they and their predecessors in title had paid no rent for generations, and were only liable to ejectment in the event of the site occupied by them being cleared of buildings. | |
| <i>Bhagwan Das v. Muhammad Yahia</i> | 292 |
| <i>Tenant in possession without a patta—Suit to enforce hypothecation of property as security for rent.</i> <i>Held</i> that a hypothecation of other property by certain tenants as security for their rent was none the less enforceable because, though the tenants had executed a qabuliat in respect of the land held by them, no patta had been executed by the landlords in their favour. <i>Sheo Karan Singh v. Maharaja Parbhu Narain Singh</i> , I. L. R., 31 All., 276, referred to. | |
| <i>Sri Kishan Das v. Yakub Khan</i> | 505 |
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| See Civil Procedure Code (1882), section 315 | 419 |
| See Civil Procedure Code (1908), order XXI, rules 84, 89, 92 | 65 |
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| See Act (Local) No. III of 1901, section 121 | 541 |

MAHA-BRAHMAN—*Agreement as to distribution of offerings*—*Construction of agreement.*] The members of a family of Maha-Brahmans entered into an agreement amongst themselves whereby certain members of the family were to take the offerings made on certain days of the month, and the other members of the family the offerings made on the other days.

Held by BANERJI and LYLE, J. J. (RICHARDS, C. J., dissenting) that such an agreement as above described would not prevent a person who wished to do so from making a special individual gift to a member of one branch of the family, even on a day which was appropriated by the agreement to the other branch, and that a claim for such gift by a member of the other branch was not maintainable.

Per RICHARDS, C. J. If the offering was of a nature which was included in the agreement between the parties, the wishes of the donor could not regulate the rights of the parties, but the recipient of such an offering on a day which did not belong to his branch of the family was bound to account for it to the branch to which the day belonged.

Doorga Pershad v. Budree, 6 N.-W. P., H. C. Rep., 189 (191) and *Oochi v. Ulfat*, I. L. R., 20 All., 234, referred to.

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MASTER AND SERVANT—*Clerk engaged on a monthly salary—Relinquishment of employment without consent of master—Clerk not entitled to salary for broken portion of month in which he left his service.*] *Held* that an office clerk engaged on a monthly salary is not entitled to any salary for the broken portion of a month in the course

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| of which he leaves his service without the consent of his employer. <i>Ridgeway v. Hungerford Market Company</i> , 3 A. and E., 171, <i>Dhumea Behara v. Sevenoaks</i> , I. L. R., 13 Calc., 80, and <i>Ramji Manor v. Little</i> , 10 Bom. H. O. R., 57, referred to. | |
| <i>Ralli Brothers v. Ambika Prasad</i> | 192 |
| MAXIM " <i>factum valet</i> ." See Hindu law | 265 |
| MINOR—Representation of minor in suits—Suit to set aside compromise of and decrees in suits to which minors were parties.—Civil Procedure Code (1882), sections 443, 456 and 462—Minors unrepresented owing to fraud and misrepresentation of <i>de facto</i> guardian whose interest conflicted with theirs—Form of decree—Civil Procedure Code (1908), section 98 Act No. I of 1877 (<i>Specific Relief Act</i>), section 42— <i>Question of law</i> .] In this case the appellants sued for a declaration that a compromise of certain pre-emption suits and decrees based thereon, made on their behalf in 1899 when they were minors, were not binding on them, having been obtained by the fraud and misrepresentation of the respondent (who was then their <i>de facto</i> guardian and manager of their property) and in proceedings in which they were practically unrepresented; and they prayed that they might be restored to the position held by them prior to the date on which the compromise and decrees were made. It appeared that although the appellants were described in the proceedings as "under the guardianship" of one H. P. he had never been properly appointed their guardian <i>ad litem</i> by the Court as required by section 443 of the Civil Procedure Code, 1882: that no <i>bona fide</i> application had ever been made under section 456 to have a guardian <i>ad litem</i> appointed by the Court; and that the leave of the Court had not been obtained to enter into the compromise on the appellants' behalf as was necessary under section 462. | |
| <i>Held</i> that the appellants were entitled to the declaration they sought. H. P. had, their Lordships found, been introduced into the suits of 1899 by the respondent as the guardian or next friend of the appellants to advance the interests of the respondent and to defeat the interests of the appellants, which conflicted with those of the respondent: he had throughout acted under the directions and on behalf of the respondent and in his interest and contrary to the interests of the appellants, and the respondent had taken advantage of his position to the detriment of the appellants. There was therefore no one to protect them, and they were unrepresented in the proceedings, which were therefore not binding on them. <i>Manohar Lal v. Jadunath Singh</i> , I. L. R., 28 All., 585: L. R., 33 I.A., 128, followed. | |
| Section 42 of the <i>Specific Relief Act</i> (I of 1877) which had been applied to the case by the majority of the Court of the Judicial Commissioner was held not to be applicable. | |
| <i>Seemle</i> the question whether on certain stated facts the relief which the appellants prayed for should be granted or refused, was a question of law within the meaning of section 98 of the Civil Procedure Code (Act V of 1908); and where, on a difference of opinion on that question between two Judges of the Court, the case was referred under that section to a third Judge, that was the only question he had jurisdiction to consider and decide. | |
| <i>Partab Singh v. Bhabuti Singh</i> | 487 |
| —See Act No. IX of 1872, section 11 | 370 |
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| MITAKSHARA. See Hindu law | 302 |

MORTGAGE—Interest—Mortgage by conditional sale with no provision for post diem interest—Post diem interest not allowed.] A mortgage executed in 1869 provided for the payment of the sum of Rs. 300 with interest at Rs. 1-8-0 per cent. per mensem in one lump sum upon a certain specified date four years from the date of the mortgage. It further provided that if the money was not paid upon that date, the property mortgaged should become the absolute property of the mortgagee. There was no stipulation of any kind as to the payment of interest after the date fixed.

Held that the mortgagee was not entitled to *post diem* interest, *Mathura Das v. Raja Narindar Bahadur*, I. L. R., 19 All., 99, distinguished. *Gudri Koer v. Bhubaneswari Coomar Singh*, I. L. R., 19 Calc., 19, and *Moti Singh v. Ramohari Singh*, I. L. R., 24 Calc., 699, followed.

Balwant Singh v. Gayan Singh 534

Parties—Suit for entire mortgage money and sale of entire mortgaged property—Omission to implead certain persons interested—Decree to which plaintiffs entitled.] Where a plaintiff mortgagee sued for the recovery of the whole of the mortgage money by the sale of the whole of the mortgaged property, but by an oversight omitted to implead certain persons who had acquired a share in the property subsequent to the mortgages in suit, it was *held*, that so much of the claim should be decreed as was proportionate to the interests of the persons who were before the court.

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Redemption—Construction of mortgage as to the terms of redemption—Mortgage and lease to mortgagor contemporaneously granted—Mortgage executed before Transfer of Property Act (IV of 1882) came into force—Mortgagee's security reduced by portion of property being withdrawn—Section 65(a) of Transfer of Property Act—Right of mortgagee to compensation.] The plaintiff (respondent) mortgaged to the defendant (appellant) certain property by a deed, dated the 25th of August, 1880, for Rs. 70,000 for eight years. On the 29th of August (and so practically contemporaneously with the mortgage) a lease of the mortgaged property was executed by the mortgagee in favour of the mortgagor at an annual rent of Rs. 4,200, which represented interest on the mortgage debt at the rate of 6 per cent. per annum. The mortgage contained a clause that "it is agreed by mutual consent of the parties that the profits of the property mortgaged shall belong to the mortgagee in lieu of the interest on the mortgage money, and I, the mortgagor, shall have no claim for mesne profits. The mortgagee also shall have no right to claim interest on the mortgage money advanced by him." The lease after reciting the mortgage referred to a provision in the latter that the mortgagor should be entitled to sell a certain portion of the mortgaged property on condition that he handed over the whole of the proceeds of the sale to the mortgagee in payment of the mortgage debt, and provided that "under the condition whatever sum of money the mortgagor should pay to the mortgagee in a lump sum should be credited and set off against the rent payable under the lease with interest at 8 annas per cent. per mensem." Subsequently three further charges were tacked on to the mortgage, the latest of which was dated the 13th of December, 1882. In June, 1881, the mortgagor was in arrear with his rent and the mortgagee brought a suit against him on which the mortgagor gave up possession of the property to the mortgagee. In a suit for redemption (the right to redeem not being disputed). *Held* that the mortgagee was entitled under the terms of the mortgage to appropriate the profits of the mortgaged property in lieu of the interest on the mortgage money not paid by the mortgagor. Evidence of preliminary negotiations and previous

conversations were not admissible to contradict or vary the terms of the mortgage (Evidence Act, section 92).

Held also, that the mortgage and the lease were both parts of one and the same transaction. But there was no inconsistency between the two instruments, nor would there have been any inconsistency if the mortgage itself had contained a provision for granting a lease on the terms upon which the lease was actually granted.

Held, further, that the original mortgage having been executed before the Transfer of Property Act came into operation, that Act was not applicable, notwithstanding that one of the further charges was executed subsequently to that date. Whatever might be the construction of section 65(a) of that Act (which was cited in support of the mortgagor's claim) he was not on the evidence and under the circumstances of the present case entitled to compensation for any loss or damage occasioned by his security being diminished owing to a portion of the mortgaged property being successfully claimed from the mortgagor.

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MORTGAGE—*Suit for sale against auction purchaser of mortgaged property—Evidence, admissibility of—Recital of receipt of consideration—Estoppel.* *Held* that an admission made by a mortgagor in a mortgage deed and also before the registering officer as to the receipt of consideration is admissible in evidence against the purchaser of the mortgaged property at an auction sale in execution of a simple money decree. *Bihari Lal v. Mukhdum Bakhsh*, I. L. R., 35 All., 194, followed. *Manohar Singh v. Samirita Kuar*, I. L. R., 17 All., 428, not followed. *Mahomed Mozuffer Hossein v. Kishori Mohan Roy*, I. L. R., 22 Cal., 909, referred to.

Held also, that a purchaser at auction of the right, title and interest of the father alone in joint family property which had been mortgaged by the father was not entitled to raise the plea that the mortgage was made without legal necessity so long as there was time yet for the sons to challenge the purchase. *Muhammad Musamill-ullah Khan v. Mithu Lal*, I. L. R., 33 All., 783, distinguished.

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| MUHAMMADAN LAW. <i>Waqf—Right of Muhammadans to worship in mosques—Suit by individual Muhammadan whose right is infringed—Civil Procedure Code (1908), order I, rule 8.]</i> Every Muhammadan who has a right to use a mosque for purposes of devotion is entitled to exercise such right without hindrance and is competent to maintain a suit against anyone who interferes with its exercise, but, if he brings his suit in his personal capacity and not on behalf of the whole Muhammadan community, the decision will be binding only as between the plaintiff and the defendant and cannot be taken advantage of by, or be binding on, the Muhammadan community in general. <i>Jawakra v. Akbar Husain</i> , I. L. R., 7 All., 178, and <i>Dasondhay v. Muhammad Abu Nasar</i> , I. L. R., 33 All., 600, followed. | |
| <i>Ram Chandra v. Ali Muhammad</i> | 197 |
| <i>Waqf—Subsequent failure of title of waqf—Right of mutawalli to sue on indemnity bond executed in favour of waqf as purchaser—Right of plaintiff to shift basis of claim during suit—Practice.]</i> A. purchased a village, the vendors giving him an indemnity bond in case he should be dispossessed. A. then made a waqf of the property purchased, naming himself as mutawalli and after him his son M. A lost the property as the result of a suit, and subsequently (A. meanwhile having died) M. sued as mutawalli to enforce the terms of the indemnity bond. <i>Held</i> that the waqf was invalid, and that M. could not be permitted to change the character of the suit by claiming as one of the heirs of A. | |
| <i>Per CHAMIER, J.:</i> —Even if the waqf was valid, the mutawalli was not entitled to maintain the suit in the absence of a transfer to him as such of the vendee's rights under the indemnity bond. | |
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| <p>PRE-EMPTION—<i>Custom—Evidence—Sales to strangers unchallenged as evidence negating custom—Mode in which such sales should be proved.</i>] Where the court is trying the issue of the existence or non-existence of a custom of pre-emption, every instance of a sale to a stranger is material evidence which the court ought to take into consideration and weigh when coming to a conclusion on the issue. But a mere vague statement that there had been sales to strangers without the production of the sale deeds or certified copies thereof and without some further details of the sale is not sufficient to prove sales to strangers. <i>Sewak Singh v. Girja Pande</i>, 2 A. L. J., 6, discussed.</p> | |
| ————— <i>Janki Misir v. Ranno Singh</i> | 472 |
| <p>—————<i>Subject matter of suit re-sold at advanced price—Second sale subject to right of pre-emption in respect of the first.</i>] A house in the city of Benares subject to a customary right of pre-emption was sold for Rs. 1,150. The vendee resold it shortly afterwards to the defendant for Rs. 4,000. <i>Held</i> on suit brought to pre-empt the property at the original price of Rs. 1,150, that the second sale was subject to the right of pre-emption and the pre-emptor was only bound to pre-empt the first sale, making the subsequent vendee a party to the suit so as to bind him by the proceedings. <i>Kamta Prasad v. Mohan Bhagat</i>, 1 L. R., 32 All., 45, referred to.</p> | |
| ————— <i>Khettar Chandra Basu Malik v. Nabin Kali Debi</i> | 385 |
| <p>—————<i>Wajib-ul-arz—Partition of village into several mahals—Dastur dehi, relating to whole village—Suit by co-sharer of one mahal against co-sharer of another mahal on ground of nearness in relationship to vendor.</i>] The <i>dastur dehi</i> of a village divided into several mahals, but which nevertheless was held to be applicable to the whole village, and to represent an arrangement come to by the co-sharers in the village amongst themselves, provided as to pre-emption, as follows:—"If a co-sharer want to sell his share, he must sell first to near co-sharers, then in the patti, then in the mahal, then in the village." <i>Held</i> that the effect of this clause was to give to a co-sharer in one mahal who was a relation of the vendor a</p> | |

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| either at the instance of or with the consent of the donor. <i>Ramamirtha Ayyan v. Gopala Ayyan</i> , I.L.R., 19 Mad., 433, dissented from. | |
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| SALE— <i>Covenant for title—Claim made against purchaser compromised before suit brought—Right of purchaser to claim indemnity from covenantor</i>] The purchaser of immovable property concerning which the seller has covenanted to indemnify the purchaser in the event of the title proving defective is not bound to wait until a suit is brought and he is deprived of the property by reason of a decree passed therein, but, if a claim which the purchaser has substantial reason to believe to be valid is brought against him, he may, after notice to the covenantor, compromise such claim and sue the covenantor on his covenant to recover the amount paid by him to effect the compromise. <i>Smith v. Compton</i> , 3 B. and A., 407, referred to. | |
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| VENDOR AND PURCHASER— <i>Sale to raise funds for litigation—Transfer whilst vendor was out of possession—Agreement depending on success of litigation—Transfer of undivided share in joint ancestral property—Interest in property giving right to sue—Vendee and provider of funds made co-plaintiffs.</i>] The original plaintiffs in the two suits out of which these appeals arose were, in one suit the sons, and in the other the grandson of the heads and managers of two distinct joint Hindu families, owners of an estate in Oudh, by whom alienations of the joint ancestral property had been made in favour of the appellant, whom they sued in ejectment to set aside those alienations on the ground that the managing members had no power to make them. As they required funds to enable them to prosecute the suits, they entered into agreements with a third person (who was made a co-plaintiff in the suits and was now respondent) to the effect that “in the share of each of them in property he will be a co-sharer of a one-half share and the remaining one half share will belong to us. . . . He will bear the entire expenses in connexion with the suit, and in case of success he will be entitled to proprietary possession of the above mentioned one-half share, or one-half of the share which may be decreed, which can remain joint or be partitioned by him as he pleases.” In the course of the litigation the original plaintiffs compromised the suits with the appellant and withdrew from them leaving the respondents to prosecute them alone. | |
| <i>Held</i> (reversing on this point the decision of the Courts in India) that the agreements (which constituted his only right to sue) conferred upon the respondent no present right to the possession of any share in the property in suit. He would only have the right to possession in case of success, and success had not been achieved. Until then he was merely a co-owner in a certain undivided share of the property. There was no present grant or assignment to him of any separate share of the property, divided or undivided, and he could not therefore maintain the suit. | |
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WILL.—*Construction of will—Rules of justice, equity and good conscience—Decree to effect an and his lawful male children according to law of inheritance—Mortgages made by testator as full owner and mortgages made by son with an estate for life only—Facts of mortgage—Alternative case set up on appeal—Facts.* T. B. S., a Muhammadan resident of the North Western Province of India, died on the 29th of November, 1904, leaving a will, dated the 23rd of October, 1904 (and therefore before the Indian Succession Act (X of 1925) came into force) whereby he made provision that certain village houses and other property should go to my daughter, and to my eldest son T. B. S., and to his lawful male children according to the law of inheritance, and in the event of my eldest son T. B. S. dying without lawful male children, to my female children, or in the event of their death to the female children born in wedlock of my sons in succession." The testator had in 1854 mortgaged his property to the extent of Rs. 50,000 with interest, and his son C. B. S., after he succeeded to the property, further mortgaged it in 1857, 1869 and 1872, and in execution of decrees obtained against him on these mortgages the property was sold and his interest therein was acquired by the various auction purchasers. T. B. S. died in 1900, without lawful male children and was succeeded by the second son of the testator, the present appellant, who in 1905 and 1906 brought the present suits for ejectment against the auction purchasers, in which he prayed for decrees for "full proprietary possession" and the suits were dealt with on that footing in the Court in India, the High Court, however only dismissing the suits because there was no specific claim for redemption. On his appeal part of the appellant's case was that the High Court, instead of dismissing the suits, should have made decrees for possession conditional upon payment of the debts binding on the estate of the testator; and during the hearing it was conceded by counsel that on the construction of the will the appellant was only a life-tenant of the property.

Held that the regulation of the succession under the will was to be determined by the rule of "justice, equity and good conscience," that the bequest was to be read in its entirety and together, and that so read there was in it no intention that his son T. B. S. should have an absolute ownership; the testator intended to regulate the succession after the death of T. B. S. and settle the mode of the subsequent enjoyment of the property, and such detailed regulations were only natural, necessary and entirely in place if T. B. S. was intended to be merely a tenant for life.

Held, therefore, that the rights under mortgages granted by T. B. S. ceased at his death, and that the appellant, as the next male heir, was entitled to the enjoyment of the estate for life free from any rights so acquired. The case, however, was very different with regard to the rights acquired under mortgages granted by the testator himself. Even if T. B. S. renewed such mortgages, the right of the mortgagees would not be prejudiced thereby, the renewal of the mortgage by a person with a limited interest in the estate not operating as a discharge of debts effectually secured upon the radical right. The appellant accordingly was not entitled to possession until full satisfaction had been made of the rights of all mortgagees and their successors under mortgages granted by the testator. The appeals were allowed and the suits remitted to the High Court on that footing.

The alternative case set up by the appellant on appeal was only permitted by their Lordships to be the ground of judgement, because

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it seemed possible in that way to construct the material for a just decision of the true rights of the parties concerned, which would be best for the interests of all and prevent further litigation.

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REVISIONAL CRIMINAL.

1912
August, 1.*Before Mr. Justice Tudball.*

EMPEROR v. HARGOBIND.*

Act No. III of 1867 (Public Gambling Act), sections 3 and 4—Presumption—Warrant not in accordance with provisions of Act.

Held that a warrant authorizing the search of any house which the police officer to whom it has issued might think proper to search was not a legal warrant within the provisions of the Public Gambling Act, 1867.

One Hargobind was convicted by a Magistrate of the first class under sections 3 and 4 of the Public Gambling Act, 1867, and fined Rs. 30. Against this conviction and sentence Hargobind applied in revision to the High Court. On this application two pleas were raised. The first was that the warrant under which the alleged public gaming house was searched was entirely illegal, the warrant being a general warrant authorizing the search of any house which the police officer to whom it was issued might think fit to search. The second ground was that the evidence was legally insufficient to warrant the conclusion that the house searched was used as a common gaming house.

Mr. A. P. Dube, for the applicant.

The Assistant Government Advocate (Mr. R. Malcomson), for the Crown.

TUDBALL, J. :—The applicant in this case has been convicted under sections 3 and 4 of the Public Gambling Act and has been fined Rs. 30. The two points taken before me are :—(1) That the search carried out by the police was entirely illegal, and, (2) that it is not proved that the house in question is a gaming house. In regard to the first point after examining the warrant I find it was issued apparently for the search of any house which the police officer to whom the warrant was issued might think proper to search. There can be little doubt that the warrant was entirely illegal and any search under it was not such as was contemplated by the Act. The result of this illegal search, however, is merely this, that no presumption whatsoever can be drawn in accordance with the Act such as is allowed by the terms thereof to be drawn in the case of a legal search. If, however, there is evidence on the

* Criminal Revision No. 499 of 1912 from an order of G. O. Allen, Magistrate, first class, of Mirzapur, dated the 18th of January, 1912.

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record to establish that the house was a gaming house and that the present applicant was using it as such for his own profit, the legality of the conviction cannot be questioned. The evidence on the record is to the effect that the house in question belongs to one Mohan Kalwar. It was empty and unoccupied. This is to be gathered from the evidence of Bindeshri, one of the defence witnesses. The prosecution evidence shows that Zakir and Hargobind, the present applicant, with or without the permission of the owner, were as a matter of fact using a room in this building for the purpose of gaming and that they were taking a portion of the winnings from the winners. The evidence is to the effect that when the police arrived gaming was going on. Sixteen cowries were found on the ground. There was also a carpet on the ground. Candles and a *chirag* were alight. A piece of chalk and a certain amount of cash was also recovered. But it is impossible to follow the train of thought in the Magistrate's mind when he said that the piece of chalk in the present case was an instrument of gaming, for there is nothing on the record to show that it was used for that purpose. It is urged that cowries are not instruments of gaming *per se*, and unless and until there is evidence to show that they were used as instruments of gaming, the court has no right to hold that they were such instruments. The evidence for the prosecution is to the effect that gaming was going on and that sixteen cowries were on the ground. *Solahi* is a game which is played with sixteen cowries and is a very common game in this country for the purpose of gambling, though it would have been better if the Magistrate had made the point perfectly clear by examination of witnesses. Still, the circumstances of the case place it beyond doubt that the game which was being played was a game of *solahi*, for which cowries are used as instruments of gaming. In my opinion, therefore, the evidence on the record is sufficient to enable the Court to hold that the applicant was using the house in question as a gaming house, deriving profit therefrom, and that the cowries were instruments of gaming and were being used as such. In these circumstances I do not deem it necessary to interfere at all in this case. The application is dismissed.

Application dismissed.

APPELLATE CIVIL.

1912
August, 8.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Banerji.

PARBATI (PLAINTIFF) v. BAIJ NATH PATHAK

AND ANOTHER (DEFENDANTS).*

Gift—Registration—Consent of donor to registration of deed of gift of immovable property not essential to validity of gift.

Held that it is not essential to the validity of a gift of immovable property that registration of the deed by which such gift is effected should be either at the instance of or with the consent of the donor. *Ramamirtha Ayyan v. Gopala Ayyan* (1) dissented from.

This was a suit for cancellation of a deed of gift of immovable property executed by the plaintiff. The claim was based upon undue influence and fraud; but these pleas were found against the plaintiff by the courts below, and the suit was dismissed. The plaintiff appealed to the High Court, where it was argued that the gift was not complete without registration, and further that registration was not valid unless procured or at least assented to by the donor. In this case registration had been obtained *in invitam*, and it was argued that the gift was still incomplete and not binding on the donor. The appeal was heard by a Bench consisting of KARAMAT HUSAIN and CHAMIER, JJ., who differed, the former holding that there was no valid and complete gift, the latter that the fact of registration being obtained against the will of plaintiff donor was not sufficient to invalidate the transaction. The decree accordingly followed the judgement of CHAMIER, J. Against this judgement the plaintiff appealed under section 10 of the Letters Patent.

Mr. M. L. Agarwala, for the appellant.

The Hon'ble Nawab Muhammad Abdul Majid, for the respondents.

RICHARDS, C.J., and BANERJI, J. :—This appeal arises out of a suit in which the plaintiff sought to set aside a deed of gift executed by her. She based her claim upon undue influence and fraud. The courts below, however, have found against her upon these grounds. It was contended, however, on her behalf that the deed was not registered at her instance or with her consent, and that registration

* Appeal No. 38 of 1912 under section 10 of the Letters Patent.

(1) (1896) L. R., 19 Mad., 433.

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was brought about compulsorily. The sole question to decide, therefore, is whether or not it is necessary in order that there should be a valid gift of immovable property not only that the instrument should be duly executed and attested in the manner provided by section 123 of the Transfer of Property Act, but also that the registration should be either at the instance of or at least with the consent of the donor. The section merely provides that the gift should be effected by an instrument executed by the donor, attested by two witnesses and registered. In our opinion a document registered in accordance with the provisions of the Registration Act is a registered instrument, and if the document is in fact duly registered in accordance with those provisions the gift is complete and valid. The law does not require that the registration should be at the instance of or with the consent of the donor. The appellant relies upon the case of *Ramamirtha Ayyan v. Gopala Ayyan* (1). It is true that the learned Judges in that case held that it was necessary that the document should be registered with the consent of the donor. They say:—"We are further of opinion that a deed of gift being a voluntary transfer remains *nudum pactum* until the donor has done all that is necessary to make it legally complete." We do not quite understand what the learned Judges meant by saying that "the transfer remained *nudum pactum* until the donor had done all that was necessary to make it legally complete." The transaction remained *nudum pactum* even after registration, that is to say, there was no consideration for it. It was a voluntary transfer. It must be remembered too that at the time this suit was instituted nothing remained for the donor to do. She had executed the deed in the presence of two witnesses and the donee had had the document registered in accordance with the provisions of the Registration Act. Of course, if the plaintiff could have proved that she was induced to execute the deed by fraud or undue influence, this would be a good ground for setting the document aside quite irrespective of whether it was registered or unregistered. In our opinion the judgement of our learned brother CHAMIER was correct. We dismiss the appeal with costs.

Appeal dismissed.

(1) (1896) I. L. R., 19 Mad., 439.

MISCELLANEOUS CRIMINAL.

1912
August. 5.*Before Mr. Justice Muhammad Rafiq.*

EMPEROR v. RAM KISHAN DAS.*

Criminal Procedure Code, section 526—Transfer—Nature of grounds warranting a transfer outside the district.

Where the Magistrate of a district refused to grant an interview to and cancelled the arms licence of a person who was under trial for various offences before the Joint Magistrate, it was *held* that these were sufficient reasons for transferring the cases against him out of the district, there being also grounds for granting a transfer from the court of the Joint Magistrate. *Farzand Ali v. Hanuman Prasad* (1) followed.

One Ram Kishan Das, a mahant of Akhara Ram Bagh in the Karwi sub-division, stood charged with various offences before the Joint Magistrate of Banda. Ram Kishan Das applied to the High Court for the transfer of the cases pending against him for reasons which will be found set forth at length in the judgement of the Court. He further asked that the cases might be transferred outside the district of Banda altogether, and his grounds for this prayer were two—(1) because the District Magistrate had, whilst the cases against him were pending in the Joint Magistrate's court, refused to grant him a personal interview, and (2) because the District Magistrate had cancelled his licence for arms.

Babu *Satyajit Chandra Mukerji*, for the applicant.

The Government Advocate (Mr. A. E. Ryves), for the Crown.

RAFIQ, J.:—The applicant, Mahant Ram Kishan Das of Akhara Ram Bagh, sub-division Karwi, has filed three applications in this Court under section 526 of the Code of Criminal Procedure, with regard to three criminal cases pending against him in the court of the Joint Magistrate of Karwi, praying that those cases be transferred to some other court outside the district of Banda on the allegation that the district authorities are prejudiced against him. The mahant stands charged with the offences of rash and negligent driving, enticing away of a married woman with criminal intent and committing riot in the course of the abduction of the woman. The allegations on which the transfer is sought are, to put them briefly:—(1) that on the 5th of June, 1912, the Joint Magistrate at first refused to see the applicant, and when on the latter's repeated

* Criminal Miscellaneous No. 135 of 1912.

(1) (1896) I. L. R., 19 All., 64.

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request an interview was allowed, the Joint Magistrate told him that the applicant was a *badmash* and ordered him to go away ; (2) that the Joint Magistrate had sanctioned the prosecution of the applicant for rash and negligent driving ; (3) that the Joint Magistrate received information of the alleged abduction at his bungalow in the middle of the night of the 27th of June, 1912, and went at once to the Railway station and issued orders to the police to make inquiry ; (4) that the District Magistrate of Banda cancelled the applicant's licence for arms and declined to see him when he called to pay his respects on the 8th of July, 1912. No explanation appears to have been submitted by the Joint or the District Magistrate in reply to the allegations of the applicant. The learned Government Advocate appears to oppose the applications for transfer. He says that he does not oppose the transfer from the court of Mr. Muir, the Joint Magistrate, not because the allegations made against him are true, but because the defence might possibly call him as a witness in the abduction case. In the case of transfer from the District Magistrate's court he opposes it strenuously on the ground that no case has been made out for imputing prejudice to the District Magistrate. For the applicant it is contended that what the court has to consider on an application for transfer is "not merely the question whether there has been a real bias in the mind of the presiding Magistrate against the accused but also the further question whether incidents may not have happened which, though they may be susceptible of explanation and may have happened without any real bias in the mind of the Magistrate, are nevertheless such as are calculated to create in the mind of the accused a reasonable apprehension that he may not have a fair and impartial trial." The withdrawal of the applicant's licence for arms and the Magistrate's refusal to see the applicant before he was found guilty by a court of law are circumstances, it is said, which are calculated to create in the mind of the applicant a reasonable apprehension that he may not have a fair and impartial trial. In support of his contention the learned counsel for the applicant relies on a case of this Court, namely, *Farzand Ali v. Hanuman Prasad* (1). The learned Government Advocate replies that the cancellation of the licence for arms is a matter purely discretionary with the Magistrate and his refusal to see a man who

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is standing his trial in a criminal court is not improper, and that neither circumstance implies a prejudice in the mind of the Magistrate, nor can it be said to create a reasonable apprehension in the mind of an ordinary man that he would not have a fair and impartial trial at the hands of the Magistrate. Moreover, it is said that the case of *Farzand Ali v. Hanuman Prasad* has not, as a rule, been followed in this Court. The correctness of the order of the Magistrate cancelling the licence for arms, or the propriety of his conduct in refusing an interview to the applicant, is not and could not be in question in the present application. Nor is it contended by the learned counsel for the applicant that the District Magistrate is, as a matter of fact, prejudiced against the applicant. What is advanced for the applicant and has to be considered is whether the said two circumstances would create in the mind of the applicant a reasonable apprehension of not getting a fair and impartial trial in the court of the District Magistrate. The position of an accused person is always one of great anxiety and suspense, and incidents, though susceptible of explanation and which would perhaps pass unnoticed but for the trial he is undergoing, alarm him and lead him to think that his guilt is already believed and that his conviction is a foregone conclusion. It is quite possible that such an impression has been produced in the mind of the applicant by the circumstances referred to above as they very likely led him to infer that the District Magistrate was displeased with him. It would, therefore, be advisable to grant the applicant's request for transfer. The suggestion that the principle enunciated in the case of *Farzand Ali v. Hanuman Prasad* has not been followed in this Court has no force, as I find on similar considerations transfers were allowed in the following cases, namely, *Krishna Nath Tewari v. King-Emperor* (1), *Inayat Ali Khan v. King-Emperor* (2) and *Muhammad Fazl-ullah v. King-Emperor* (3). I think it is expedient in the ends of justice that the three cases pending against the applicant in the court of the Joint Magistrate of Karwi should be transferred to another district. I am told that Allahabad is as far from Manikpur, where most of the witnesses live, as Banda is, and that it would be convenient to both parties

(1) Decided on the 23rd of March, 1910. (2) Decided on the 18th of October, 1910.
(3) Decided on the 1st of April, 1912.

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to have the case tried in Allahabad. I order that the three cases, against the applicant, be transferred from the court of the Joint Magistrate of Karwi to that of the District Magistrate of Allahabad, who will either try the cases himself or send them for trial to some other Magistrate subordinate to him competent to try them.

Application allowed.

REVISIONAL CRIMINAL.

1912
August, 13.

Before Mr. Justice Muhammad Rafiq.

EMPEROR v. DEBI PRASAD.*

Criminal Procedure Code, sections 4 and 195(1)—"Complaint"—Information of the supposed commission of an offence communicated by the District Judge to the District Magistrate with a view to the latter taking action as a magistrate.

A Munsif, being of opinion that a document filed in a case before him had been tampered with, communicated his suspicions to the District Judge, who thereupon wrote to the District Magistrate, requesting him to take action in the matter. *Held* that the letter of the District Judge to the District Magistrate amounted to a complaint within the meaning of section 195 (c) of the Code of Criminal Procedure. *Emperor v. Sundar Sarup* (1) followed.

In this case the Munsif of Havali, Bareilly, coming to the conclusion that a document filed in a case before him had been tampered with, communicated his views on the subject to the District Judge. The District Judge thereupon wrote to the District Magistrate requesting him to take action in the matter, and the District Magistrate initiated proceedings against the person concerned and made the case over to the Joint Magistrate. An application for revision of the District Magistrate's order and to set aside the proceedings pending against the applicant was accordingly preferred to the High Court on the ground that there existed no legal foundation for the exercise of his jurisdiction by the Joint Magistrate.

Mr. *Nihal Chand*, for the applicant.

The Government Advocate (Mr. *A. E. Ryves*), for the Crown.

RAFIQ, J.—It appears that in a case pending in the court of the Munsif of Havali in the district of Bareilly a document was tampered with. The learned Munsif reported to the District Judge about the tampering with the document. The latter wrote to the District Magistrate to take action in the matter. The case was made over to the Joint Magistrate of the district for trial. The

*Criminal Revision No. 530 of 1912.

(1) (1904) 1, L. R., 26 All., 514.

applicant, who is one of the accused in the case, has filed this petition, under section 439 of the Code of Criminal Procedure, for revision of the proceedings pending in the court of the Joint Magistrate. It is contended on his behalf that the Joint Magistrate has no jurisdiction to try the applicant and the other accused inasmuch as no complaint according to law has ever been filed. It is argued that the letter of the District Judge to the District Magistrate, in the absence of any proceedings under section 476 of the Code of Criminal Procedure, does not fall within the definition of a complaint, and that section 195, sub-section (1), of the Code of Criminal Procedure has no application. In support of this contention the learned counsel has cited *In the matter of the petition of Mathura Das* (1) and *In Re Lakshmidas Lalji* (2). A later decision of this Court, viz., *Emperor v. Sundar Sarup* (3), covers the present case. The application is therefore rejected.

Application rejected.

APPELLATE CIVIL.

Before Mr. Justice Sir Henry Griffin and Mr. Justice Chamier.

HIRDEY NARAIN AND ANOTHER (OPPOSITE PARTIES) v. MRS. M. J.

POWELL AND ANOTHER (OBJECTORS) *

Act No. I of 1894 (Land Acquisition Act), section 30—Compensation—Mode of apportioning amount allotted as compensation between different interests.

Where land which is taken up under the Land Acquisition Act belongs to two or more persons the nature of whose interest therein differs, the compensation allotted therefor must be apportioned according to the value of the interest of each person having rights therein so far as such value can be ascertained.

THIS was an appeal from an order or decree of the District Judge of Saharanpur, made on a reference under section 30 of the Land Acquisition Act, 1894, apportioning the compensation payable in respect of certain land in which both were interested between the appellants and respondent.

The facts out of which the appeal arose are set forth in the following order of remand:—

Dr. Tej Bahadur Sapru, for the appellants.

Mr. A. E. Ryves and Mr. Nihal Chand, for the respondents.

* First Appeal No. 351 of 1910, from a decree of E. O. E. Leggatt, District Judge of Saharanpur, dated the 14th of July, 1910.

(1) (1892) I. L. R., 16 All., 80.

(2) (1907) I. L. R., 32 Bom., 184.

(3) (1904) I. L. R., 26 All., 514.

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KARAMAT HUSAIN and CHAMIER, JJ.:—This is an appeal against an order or decree of the District Judge of Saharanpur, awarding to the appellants $\frac{1}{4}$ of the sum of Rs. 7,768-8-0, awarded by the Superintendent of Dehra Dun as compensation for certain land taken up under the Land Acquisition Act for public purposes. It is not now disputed that Rs. 7,768-8-0 represent the fair value of the property taken up, and the only question for decision now is how this sum should be divided between the appellants and the respondent Mrs. Powell. The Superintendent proposed to award to the appellants the whole of the above sum except Rs. 144 which he considered to be the value of Mrs. Powell's interests in the land. She objected to this, and the Superintendent referred the matter to the District Judge. Mrs. Powell's case was that she was virtually the zamindar of the land and that the appellants were only nominally zamindars and were entitled at best to compensation calculated on the amount of rent paid to them. The rent was Rs. 12 per annum, and her suggestion was that the zamindars should be awarded Rs. 144 only. The reference by the Superintendent was made to the District Judge early in 1910. A date was fixed for the hearing of the case in June 1910, and it was decided that the case should be taken up at Dehra Dun. On some day in June, the exact date is not clear, it seems to have occurred to some one that the appellants were interested in the case, as of course they were, and on June, the 13th, notice was issued to the appellant, Hirde Narain, that the case would be taken up on the following day. Notice was served upon Hirde Narain on the 13th of June, at 9 p.m. He appeared before the court on the following day, and, as the Judge observes, very reasonably asked for time. On that day two witnesses only were examined for Mrs. Powell and the case was adjourned to June 22nd. It was taken up on June 25th. Witnesses were examined on that day and on the 26th, one witness only being produced by Hirde Narain. Here we may mention that although Maharaj Narain seems to have a share in the property, no notice was issued to him. But this is not made a ground of complaint here, and for present purposes Maharaj Narain may be disregarded. The object of Mrs. Powell seems to have been to prove that occupancy tenants, like herself, were entitled to build upon their land also to transfer it to whomsoever

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fixed as long ago as 1890. They point out that a land-holder may sue an occupancy tenant for enhancement of the rent on the ground stated in section 43 of the Tenancy Act, and they contend that inquiry should be made as to whether Mrs. Powell was not at the date of the acquisition of the land paying rent at a rate below the prevailing rate paid by occupancy tenants for lands of similar quality and with similar advantages, and also that there has been a rise in the average local prices of staple food crops during the currency of the present rent. Owing to the fact that no issue was struck in this case the necessity for making a proper inquiry into the respective values of the interests of the parties has been overlooked. It has been held in more than one case in the Calcutta High Court that where a sum is to be apportioned between a land-holder and a subordinate tenure-holder, the respective values of the interests of the two should be ascertained, and, if possible, something should be awarded to the land-holder on account of the possibility that he may be able to have the rent of the subordinate tenure-holder enhanced. *Mutatis mutandis* what was said in those cases applies to the present case. If it can be shown that the land-holder was at the time of the acquisition of the land entitled to have the rent enhanced, there would be no difficulty in ascertaining to what extent the rent might have been enhanced had the land not been acquired by the Government. There is some evidence that the land-holder took steps to have the rent enhanced, but abandoned them. Considering that notice of the case was given at the last moment to the appellant, and considering that no attempt has been made to ascertain the respective values of the interests of the parties in the land, we think that a further inquiry should be held. Under order XLI, rule 25, we remit to the court of the District Judge the following issue:—What are the respective values of the interests of the appellants and Mrs. Powell in the land in question? Further evidence may be admitted on both sides. On return of the finding ten days will be allowed for filing objections.

On receipt of the finding the following judgement was delivered:—

GRIFFIN and CHAMIER, JJ.:—This case was remitted to the District Judge in order that he might ascertain the respective values of the interests of the appellants and Mrs. Powell in the land in

question for which the Superintendent of Dehra Dun has awarded under the Land Acquisition Act a sum of Rs. 7,768-8-0. The learned Judge rightly, as we think, set himself to ascertain what were the respective rights of the appellants and Mrs. Powell in the land. He came to the conclusion that Mrs. Powell was what he calls an *abadi* tenant, having a right to build on the land and to transfer it, that the interest of the appellant in the land was worth no more than Rs. 1,060, and that the balance of the sum awarded by the Superintendent of Dehra Dun, namely, Rs. 6,708-8-0, should be given to Mrs. Powell. But in case this Court did not agree with the view that Mrs. Powell was an *abadi* tenant, he went on to ascertain the values of the respective rights of the parties in the case on the assumption that Mrs. Powell was an occupancy tenant of the land. He found that the annual value of Mrs. Powell's interest as an occupancy tenant was Rs. 22, and the annual value of the appellants' interests as landlords was Rs. 11. He then suggested that Mrs. Powell should be given a sum of Rs. 352, that is, sixteen years' purchase of the annual value of her interests and that the balance should be given to the appellants. We are unable to accept either of these conclusions in their entirety. Mrs. Powell, or rather the person through whom she claims, is recorded as an occupancy tenant of the land. There is really no evidence as to the circumstances in which, or even as to the time when, Mrs. Powell's predecessors first obtained the land. Both sides have indulged in much speculation as to what their respective rights must be. One fact stands out clearly, namely, that for the last fifty or sixty years the land has been used for agricultural purposes, and in the absence of definite evidence as to the respective rights of the parties in the land, we think that the sum awarded should be divided between them in proportion to the values of the interests hitherto enjoyed by them, after making due allowance for the possibility of the rent being enhanced. We accept the finding of the District Judge that the annual value of Mrs. Powell's interest in the land is Rs. 22, and that the annual value of the appellant's interests is Rs. 11. But it seems to us that the whole sum awarded by the Superintendent should be divided amongst them in proportion to the value of their interests, and that there is no justification for what the learned Judge has done, namely, give Mrs. Powell sixteen times

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the value of her interest and give the appellants the whole of the balance. It would be as wrong in our opinion to give the appellants sixteen times the value of their interests in the land and to give Mrs. Powell the whole of the balance. The result is that we hold that the sum in question should be divided in the proportions of $\frac{1}{3}$ rd and $\frac{2}{3}$ rds, $\frac{1}{3}$ rd going to the appellants and $\frac{2}{3}$ rds to Mrs. Powell, that is to say, Rs. 2,590 to the appellants and Rs. 5,178-8-0, to Mrs. Powell. The decree of the court below is modified accordingly.

Decree modified.

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November, 12.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Banerji.

JAGAN NATH AND ANOTHER (PLAINTIFFS) v. AJUDHIA SINGH (DEFENDANT).^{*}
Act (Local) No. II of 1901 (Agra Tenancy Act), section 95—Civil and Revenue Courts—Jurisdiction—Dispute between rival claimants to a tenancy.

Held that the question of title to a tenancy arising between rival claimants to that tenancy is a question which is cognizable by a civil court and is not a matter coming within the purview of section 95 of the Agra Tenancy Act, 1901. *Bhup v. Ram Lal* (1) followed. *Zubeda Bibi v. Shco Charan* (2) and *Hamid Ali Shah v. Wilayat Ali* (3) referred to.

The facts, of this case were as follows:—

The plaintiffs brought a suit in a Court of Revenue under section 58 of Act No. II of 1901, for ejectment of the present defendants from a plot of land which they claimed as their occupancy holding and which, they alleged, had been sub-let to the defendants. The defendant claimed that he was not a sub-tenant, but that the land was his occupancy holding, and he also applied to the Revenue Court for correction of the revenue registers in which the plaintiffs were recorded as occupancy tenants of the land in dispute. The Assistant Collector dismissed the plaintiffs' suit on the ground that there was a defect in the frame of the suit. He, however, in the proceedings taken for the correction of revenue registers, accepted the defendant's plea and directed the defendant's name to be entered as occupancy tenant of the plot in dispute. The plaintiffs then brought the present suit in the civil court on the allegation that the defendant having denied the plaintiffs' title was liable to ejectment as a trespasser. The defendant pleaded that the suit was not maintainable in the civil court.

^{*}Appeal No. 59 of 1912, under section 10 of the Letters Patent.

(1) (1911) I. L. R., 33 All., 795. (2) (1899) I. L. R., 22 All., 83.

(3) (1899) I. L. R., 22 All., 93.

The courts below decreed the claim.

The defendant appealed to the High Court, and the appeal, coming before a single Judge of the Court, was decreed and suit dismissed in the following judgement :—

"The plaintiffs in the present suit brought a suit against the first defendant under section 58 of the Agra Tenancy Act, alleging that he was a tenant at will of certain land. The first defendant replied that he was the occupancy tenant of the land, and he at once took steps by instituting another proceeding to have the revenue record corrected. Both cases came before the Assistant Collector together and were disposed of by one judgement. The suit under section 58 was taken on appeal to the Commissioner, who decided that it was not maintainable, because one of the present plaintiffs did not wish to eject the defendant. The result was that in that suit no decision was given as to the rights of the first defendant. Meanwhile the revenue record had been corrected in the manner suggested by the first defendant. The plaintiffs instituted the present suit in the court of the Munsif, saying that the first defendant had taken the land from them as a tenant, that he had resisted the suit under section 58, that when doing so he had pleaded that he was the occupancy tenant of the land, and that this amounted to a denial of the plaintiffs' title, with the result that the plaintiffs were entitled to treat him as a trespasser, and they asked for a decree for possession against him. The Munsif decreed the claim, and his decision was confirmed by the Subordinate Judge on appeal. In second appeal it is contended on behalf of the first defendant that the suit is not maintainable. It appears to me that this contention is sound and must be accepted. The plaintiffs admit that the first defendant was their tenant. They say that he is liable to be treated as a trespasser, because he set himself up as an occupancy tenant. Before I can hold that the defendant, who admittedly was till recently a tenant of some kind, has become a trespasser, I must hold that he was wrong in claiming to be an occupancy tenant of the land. I cannot decide that he was wrong in claiming to be an occupancy tenant without trenching on the jurisdiction of the rent court. The question whether a person is a tenant at will or an occupancy tenant is one in respect of which a suit can be brought under the Tenancy Act, and the decision is reserved exclusively for the revenue court. I hold that the present suit is not maintainable. I allow the appeal and dismiss the plaintiffs' respondents' suit with costs in all courts. I have said nothing about the effect of the order that the revenue record should be corrected, for it is not clear whether it was made under the Revenue Act or was a declaration made under Tenancy Act."

Against this judgement the plaintiffs appealed under section 10 of the Letters Patent.

Babu Piari Lal Banerji, for the appellants.

The mere fact that the plaintiffs alleged the defendant to be their tenant in the former proceedings in the revenue court did not estop them from now alleging that the defendant having denied their title had become a trespasser, and on the pleadings in the present

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suit it is quite clear that the suit is maintainable in the civil court. The defendant never pleaded in the former suit, nor does he plead in the present suit, that he is the plaintiffs' tenant, and the revenue court not having decided that the relationship between the parties was that of landlord and tenant, there was nothing to prevent the present suit being maintained in the civil court: *Zubeda Bibi v. Sheo Charan* (1), *Hamid Ali v. Shah Wilayat Ali* (2).

Moreover, the dispute in the present case was not a dispute between landlord and tenant but was a dispute between two rival tenants relating to a tenancy, and such a question was not exclusively reserved for the revenue court but could be decided by a civil court. The point is further covered by authority: *Bhup v. Ram Lal* (3).

Maulvi *Shafi-uz-zaman*, for the respondent:—

The case relied on relates to a dispute between two rival claimants to tenancy on succession. Moreover, the plaintiffs having alleged that the defendant was their tenant, and having brought their suit in the revenue court for his ejectment could not bring the present suit in the civil court: *Narain Singh v. Govind Ram* (4).

Babu *Piari Lal Banerji* was not heard in reply.

RICHARDS, C. J.—This Letters Patent Appeal arises out of a suit in which the plaintiffs sought to recover possession of certain immovable property, treating the defendant as a trespasser. The facts, so far as I consider them material, are as follows. Prior to the institution of the present suit the plaintiffs brought a suit in the revenue court seeking to eject the defendant as their sub-tenant. They claimed that they were the occupancy tenants and that the defendant was their sub-tenant. The plea put in by the defendant was that he was not a sub-tenant but the occupancy tenant of the holding. The Assistant Collector was of opinion that the defendant was, as he alleged, the occupancy tenant. In other words he held that the relation of landlord and tenant did not exist between the plaintiffs and the defendant. As a result of this finding the suit for ejectment in the revenue court necessarily failed. There was an appeal to the Commissioner who held for other reasons that the ejectment suit brought by the plaintiffs failed. The plaintiffs then instituted the present suit to get possession of the property. The

(1) (1900) I. L. R., 22 All., 83.

(3) (1911) I. L. R., 33 All., 795.

(2) (1900) I. L. R., 22 All., 93.

(4) (1911) 8 A. L. J. R., 431.

question of course upon which the success or failure of the suit depended was whether or not the defendant was the occupancy tenant. The learned Munsif decided in his favour. On appeal the learned Subordinate Judge confirmed the decision of the Munsif. On second appeal to this Court a learned Judge held that the present suit was not cognizable by the civil court and on that ground allowed the appeal and dismissed the plaintiffs' suit.

It seems to me that the question of title to a tenancy arising between rival claimants to that tenancy is a question which is cognizable by a civil court. This has been decided, I think, in principle in the case of *Zubeda Bibi v. Sheo Charan* (1), in the case of *Hamid Ali Shah v. Wilayat Ali* (2) and in the case of *Bhup v. Ram Lal* (3). The learned judge of this Court says:—
 "Before I can hold that the defendant who admittedly was till recently a tenant of some kind, has become a trespasser, I must hold that he was wrong in claiming to be an occupancy tenant of the land. I can not decide that he was wrong in claiming to be an occupancy tenant without trenching on the jurisdiction of the rent court. The question whether a person is a tenant at will or an occupancy tenant is one in respect of which a suit can be brought under the Tenancy Act and the decision is reserved exclusively for the revenue court." I cannot altogether agree with what the learned Judge has stated above. It is quite true that if a person was claiming to be an occupancy tenant, whilst his landlord was contending that he was a mere tenant-at-will, this would be a question exclusively triable by the revenue court. But that is not the question in the present suit. The question in the present suit is, 'to whom does the tenancy belong, does it belong to the plaintiffs or the defendant?' If the tenancy belongs to the plaintiffs, then they are clearly entitled to treat the defendant as a trespasser, having regard to the plea that he put forward in the revenue court, in which he totally denied their title and claimed that he alone was the occupancy tenant. If, on the other hand, the tenancy belongs to the defendant, it is quite clear that the plaintiffs' suit must be dismissed. It has been contended that the present suit is of the nature mentioned in section 95 of the Tenancy Act. In my opinion it is only necessary to read

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(1) (1899) I. L. R., 22 All., 83.

(2) (1899) I. L. R., 22 All., 98.

(3) (1911) I. L. R., 33 All., 795.

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the opening words of that section to see that the section deals with questions arising between landlord and tenant and that it does not in any way apply to rival claimants to any of the various classes of tenancy mentioned in the Tenancy Act.

I, therefore, would allow the appeal, as no other question arises.

BANERJI, J.—I am also of opinion that the jurisdiction of the civil court was not excluded by reason of the provisions of the Tenancy Act. The suit in this case would be cognizable by the civil court unless it came within the purview of any of the clauses of section 95 of that Act. I adhere to the view expressed in the case *Bhup v. Ram Lal* (1) that where a dispute arises between rival claimants to a tenancy that is not a matter which can be determined under section 95. In the present case the dispute is between persons who claimed to be entitled to the tenancy. There is no question as between either of them and the landlord. The plaintiffs allege that the defendant is a trespasser, and they claim to eject him as such. Such a suit could not be brought in the revenue court, and the only court which could take cognizance of it is the civil court. It is true that the plaintiffs sued in the revenue court to eject the defendant on the allegation that the defendant was their subtenant. Had the revenue court decided that question and held that the defendant was the tenant of the holding, there might have been some difficulty in the plaintiffs' way; but in this case, as pointed out by the lower appellate court, the Commissioner did not determine the question whether the plaintiffs were the tenants of the holding, or the defendant was so. He dismissed the plaintiffs' suit by reason of a defect in the frame of the suit. So that the question "who is the tenant of the holding" remained undecided by the revenue court. As both parties claimed to be tenants, the question was one between rival claimants to the tenancy, and it could not be taken into the revenue court in any of the forms of suits mentioned in section 95 of the Tenancy Act. The civil court therefore had jurisdiction to hear the case. On the merits that court found in favour of the plaintiffs. They were therefore entitled to the decree which was granted by the courts below, and this appeal must prevail.

(1) (1911) I. L. R., 33 All., 795.

BY THE COURT:—The order of the Court is that we allow the appeal, set aside the decree of the learned Judge of this Court and restore the decree of the lower appellate court with costs of both hearings in this Court.

Appeal allowed.

Before Mr. Justice Muhammad Rafiq and Mr. Justice Piggott.

SIS RAM AND OTHERS (DEFENDANTS) V. ASGHAR ALI (PLAINTIFF)*

Landholder and tenant—Agreement to deliver agricultural produce over and above cash rent—Cess—Agreement opposed to public policy.

Certain tenants holding under a registered *qabuliat* agreed therein to deliver to their landlord, over and above the sum specified as a money rent, certain agricultural produce, and further to supply the landlord with a cart and bullocks "when necessary" and in default the landlord might claim the cash value of the said dues along with the rent. Held, on suit by the landlord to recover the cash equivalent of such dues for several years, that the covenant in question was for various reasons unenforceable. *Abdul Hai v. Nathua* (1), *Sadanand Pande v. Ali Jan* (2) and *Sheoambar Ahir v. The Collector of Azamgarh* (3) referred to.

This was a suit to recover the money value of certain *zāmin-dari* dues alleged to be realizable from the defendants under the following circumstances. The defendants were tenants of the plaintiff, holding under a registered *qabuliat*, by which they agreed to pay a certain rent in cash. Besides the payment of rent, they agreed to deliver to the plaintiff annually certain agricultural produce and to provide the plaintiff with a cart and bullocks "when necessary." In default the plaintiff might claim the cash value of the said dues along with the rent. The suit was filed in the court of a Munsif, who dismissed it. On appeal the District Judge remanded the case to the court of first instance, acting under sections 196 and 197 of the Agra Tenancy Act, 1901. Against this order of remand the defendants appealed to the High Court.

Mr. D. R. Sawhny, for the appellants.

Maulvi Ghulam Mujtaba and Maulvi Shafi-uz-zaman, for the respondent.

MUHAMMAD RAFIQ and PIGGOTT, JJ.:—In this case, the plaintiff is the landholder and the defendants are the tenants of

*First Appeal No. 42 of 1912 from an order of C. E. Guiterman, Additional Judge of Meerut, dated the 15th of December 1911.

(1) (1903) 1 A. L. J., 537. (2) (1910) 1 L. R., 32 All., 193.

(3) (1912) 1 L. R., 34 All., 358.

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certain land. The conditions of the tenancy are determined by a registered *qabuliat*, dated January the 3rd, 1907. By this instrument the defendants contracted to pay to the plaintiff for the use and occupation of this land an annual rent of Rs. 99, and they further contracted that they would also render to the plaintiff certain zamindari dues (*rasum zamindari*) which are set forth in detail, and that in the event of their failing to do so, the plaintiff might claim the cash value of the said dues along with the rent. It may be convenient at once to state what these dues were. The defendants were to deliver to the plaintiff annually 1 jar containing treacle or raw sugar, 25 bundles of cattle fodder, 2 bundles of *bhusa*, 4 jars containing sugarcane juice, 1 basket-load of cow-dung cakes, and 5 *pakka* seers of hemp. The defendants further undertook to give the plaintiff the use of a cart and bullocks "when necessary." We are not concerned in this case with the payment of the cash rent of Rs. 99. Either it has been paid, or at any rate it is not claimed in this suit. The suit as brought appears to be one for damages for breach of a contract in writing registered. It claims the cash value for five years of these zamindari dues which, it is alleged, the defendants failed to render though bound under contract to do so. The plaint itself suggests no basis of valuation in respect of the vague agreement to supply a cart and bullocks "when necessary," but the damages for breach of this stipulation are stated at Rs. 15. In respect of the remaining articles which the defendants contracted to supply, the claim appears to be for their cash value at certain rates. The court of first instance, the Munsif of Muzaffarnagar, framed four issues, the first two of which were whether the suit is in fact one for recovery of cesses, and therefore not maintainable by reason of the provisions of sections 56 and 86 of the United Provinces Land Revenue Act, Local Act No. III of 1901, and whether the suit is not cognizable by the civil court. Having found against the plaintiff on each of these issues, the Munsif dismissed the suit. On appeal the learned District Judge held that the suit was essentially one for arrears of rent. He held further that it ought to have been filed as a suit for arrears of rent in the court of an Assistant Collector, and that by reason of the provisions of sections 196 and 197 of the Agra Tenancy Act, Local Act No. II of

1901, it was incumbent upon him to deal with the suit on its merits. He, therefore, remanded the case for trial of the remaining issues, and in the exercise of the discretion conferred upon him by section 197 aforesaid, he addressed his order of remand to the court of the Munsif. The defendants come to us in appeal against this order of remand. It is contended on their behalf that this is not a suit to which sections 196 and 197 of the said Act apply, and further that in any case the suit is one for the recovery of cesses, and that the Munsif's order dismissing the same should be maintained. We have heard arguments at considerable length on both points. In respect of the first point, we are content to remark that if we could have accepted the view of the learned District Judge as to the nature of the suit, we should have been prepared to hold that he had jurisdiction to deal with it under the sections of the Agra Tenancy Act already referred to. We are, however, of opinion that the other ground taken in appeal must prevail, and that the Munsif's order dismissing the suit was right. The learned District Judge says that this must be regarded as a suit for arrears of rent, because there is nothing to prevent a tenant from contracting to pay a portion of his rent in cash and another portion in kind. This view of the case is open to objections on various grounds. As a matter of fact, the contract before us is not one to pay a portion of the rent in cash and another portion in kind. There is nothing in the terms of the contract to suggest that the various articles which the defendants undertook to supply were to be the produce of the fields in suit. The cow dung cakes certainly could not be the produce of their fields, nor had the covenant regarding the cart and bullocks anything to do with the produce of the fields. Nor would it be possible to understand the contract of lease as a whole as binding the defendants to cultivate sugarcane or hemp every year on some portion of the land in order to supply the products of such cultivation to their landholder. Moreover, the suit as brought was not a suit for arrears of rent. The covenant, if enforceable at all, was enforceable according to its terms, namely, that the cash value of the zamindari dues was to be claimed along with the rent. The fact that the plaintiff failed to do this, and endeavoured to bring his case before the court on a different basis, shows that he was

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Municipal Board of Allahabad published certain rules for the regulation of *tahbazari* in the Allahabad municipality. These rules profess to have been passed under section 128 (h) (i). They were duly confirmed by the local Government, and by them no person is allowed to sell or expose for sale any goods in any street or public place under the control of the Board except by permission of the Board and on payment of such fees as the market committee may fix. If the making of these rules is within the powers invested by law in the municipality of Allahabad, then Imami has undoubtedly committed a breach of the rule. On the other hand, if they are *ultra vires*, Imami has not committed any breach.

The Municipal Board derive their power to make rules from Local Act No. 1 of 1900. Section 128 of that Act lays down that any Board may by rules provide for the inspection and proper regulation, *inter alia*, of any place of public entertainment and resort, and for the charge of fees for the use of such places when vested in the Board. The question we have to decide is whether power has been given under this section to the Municipality to provide for (1) any place of public entertainment; (2) any place of public resort. This is the way in which the Municipal Board read the rule. They contend that they are empowered to provide for the inspection and proper regulation, not merely of any place of public entertainment but also of any place of public resort. The petitioner, on the other hand, contends that unless it can be shown that this strip of land is a place both of public entertainment and public resort, the Municipal Board are not empowered to provide for its inspection and to charge fees for its use. The question is by no means an easy one to decide and we have taken time to consider our judgement. We wished to find whether there existed any precedent which might show how other courts have interpreted similar rules. Careful search has been made and no precedent could be found, and we are left to interpret the Act by the ordinary rules for interpretation of Acts of this nature. The first consideration is, whether we may rightly conclude that it was the intention of the Legislature to give the municipality powers to provide for the inspection and proper regulation of every place of public resort. This will include places for worship, such as temples, mosques, cathedrals and churches. All these are places of public resort.

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The same reasoning may apply to courts of justice and many other public buildings to which the public from time to time resort. It seems to us far from likely that such was the intention of the Legislature.

Next, bearing in mind that when we interpret an Act like the present, which is an Act encroaching on the rights of the subject, we have a right to expect that the Legislature will manifest its intention plainly, if not in express words, at least by clear implication and beyond reasonable doubt [Maxwell's Interpretation of Statutes, 4th Edition, page 429, and cases cited therein]. On turning to the actual words used we find a number of places mentioned as places which may be inspected and regulated. Each of these is divided from the place following it by a comma. With the exception of "dairies and bakeries," which are lumped in one, each place is separately named and falls into a separate category. The last category appears to include places of public entertainment and resort, and we hold that if it had been the intention of the Legislature that places of public resort which are not places of public entertainment, should be inspected and properly regulated, the two kinds of places would have been separately named. In our opinion the word, "public entertainment and resort" cannot be read distributively. The one argument that tells against this interpretation is the collocation of dairies and bakeries in this very same section 128 (*h*) (i). But whether this was due to an oversight or to some other case, we need not in this cause consider.

Furthermore, we doubt whether it was ever the intention of the Legislature in section 128 (*h*) (i) to provide for the regulation of streets. Provisions for regulation of streets occur in other parts of the Act, and it seems a forced idea to talk of providing for the inspection of a street or the land adjoining the same.

Finally, we might add, that the word 'entertainment'—so far as Mr. Murray's Dictionary is any guide—could not properly be applied to a street or a *patri* adjoining a street.

For all these reasons, we have arrived at the conclusion that the rule with the breach of which Imami is charged was not a rule which the Municipal Board of Allahabad was empowered to pass under section 128 (*h*) (i). We, therefore, set aside the conviction and direct that the fine, if paid, be refunded.

Application allowed.

FULL BENCH.

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August 6.

Before Sir Henry Richards, Knight, Chief Justice, Mr. Justice Banerji and
Mr. Justice Tudball.

DEBI PRASAD (DEFENDANT) v. BHAGWAN DIN AND OTHERS
(PLAINTIFFS).*

Expropriary tenant—Sale by one of several co-owners holding sir land of his undivided zamindari share—Vendor expropriary tenant of all the co-parceners and not merely of his vendees.

Where the owner of an undivided share in a *patti* sells his zamindari rights and becomes an expropriary tenant of the sir land held by him he becomes the tenant as regards such land, not merely of his vendees but of all the co-sharers in the *patti*.

THIS was an appeal under section 10 of the Letters Patent from a judgement of a single Judge of the Court. The facts of the case appear from the judgement under appeal, which was as follows :—

“The plaintiffs are the proprietors of a one anna share of *patti* Ram Dayal. The defendants 2 to 4 owned the remaining $3\frac{1}{4}$ annas share in the same *patti*. Their right to this share has been acquired by defendant No. 1, Debi Prasad. Defendants 2 to 4 were in possession of certain plots, some as sir, some as *khud-kasht*, and some for a period of less than twelve years. The plaintiffs in this suit sought for a declaration of their right to collect their proportionate share of the rent payable by defendants 2 to 4 on the lands in this *patti*. The courts below have decreed the plaintiffs' suit only in so far as the plots in the possession of the defendants 2 to 4 as non-occupancy tenants are concerned. The courts below are of opinion that the defendant Debi Prasad, who has acquired the proprietary rights of defendants 2 to 4, was alone entitled to collect the rent payable by defendants 2 to 4, on the land held by them as ex-proprietary tenants. The plaintiffs appealed and an objection also has been filed on behalf of the defendants. An issue was remitted by this Court to ascertain whether defendant No. 1, Debi Prasad, has collected the entire rent from defendants 2 to 4, hitherto, or whether the plaintiffs had been collecting their proportionate share of the rent payable by these tenants. The finding of the court below on this issue is that the plaintiffs have been collecting their proportionate share of rent due from defendants 2 to 4 direct. This finding is in favour of the plaintiffs appellants. The learned advocate who appears on behalf of the defendants supports the view taken by the court below and contends that his clients as purchasers of the rights of defendants 2 to 4 are entitled to collect the rent payable by these defendants on land held by them as ex-proprietary tenants to the exclusion of the plaintiffs. The right of the plaintiffs to a share in the profits is not denied. In my opinion this appeal must succeed. The *patti* is an undivided one. The defendant No. 1 acquired the proprietary rights of defendants 2 to 4. Thereupon defendants 2 to 4 became the ex-proprietary tenants of the

*Appeal No. 8 of 1912, under section 10 of the Letters Patent.

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entire body of co-sharers. No provision of law has been pointed out to me which confers on defendant No. 1 the exclusive right of collecting rent from defendants 2 to 4 in respect of land held by them as ex-proprietary tenants. No custom or contract to that effect has been pleaded. I allow this appeal, set aside the decree of the courts below and decree the suit for a declaration that the plaintiffs are entitled to recover rent from defendants 2 to 4 to the extent of their share in respect of all the lands in the occupation of defendants 2 to 4 as tenants. The plaintiffs shall obtain their costs throughout."

The defendants appealed.

The Hon'ble Dr. *Sundar Lal* and Pandit *Vishnu Ram Mehta*, for the appellant.

Munshi *Haribans Sahai* and Pandit *Uma Shankar Bajpai*, for the respondents.

RICHARDS, C. J. and BANERJI and TUDBALL JJ :—This appeal arises out of a suit in which the plaintiffs claimed a declaration that they were zamindars and owners of one anna out of a $4\frac{1}{2}$ anna share in each of the plots in dispute which were detailed in the plaint and are entitled to realize the rent from the defendants 2 to 4. The facts are—that one Ram Dayal owned a *patti* called Patti Ram Dayal, the extent of which was $4\frac{1}{2}$ annas of the mahal. After his death, in some way which it is unnecessary to consider, a one anna fractional share therein went to the plaintiffs and the remaining $3\frac{1}{2}$ annas went to the defendants 2 to 4. The rights of the defendants 2 to 4 have been acquired by defendant No. 1, the result of which was that defendants 2 to 4 became ex-proprietary tenants of the *sir* which they held prior to the acquisition of their proprietary rights by defendant No. 1. The real question is whether the defendants 2 to 4 are, in the events which have happened, the ex-proprietary tenants of the defendant No. 1 or the ex-proprietary tenants of all the proprietors in the *patti*, that is to say, of the plaintiffs and defendant No. 1. This was the question which came before a learned Judge of this Court, from whose judgement this appeal under the Letters Patent has been preferred. The learned Judge came to the conclusion that the defendants 2 to 4 were the ex-proprietary tenants of all the proprietors of the *patti*, and not of the defendant No. 1 alone. In our opinion this, in view of the circumstances of this case, is correct. It seems to us that prior to the sale all the co-sharers in the *patti* were the proprietors of all the plots that went to make up the *patti*, irrespective of the *sir*

rights of the several co-sharers. For the purpose of distribution of profits a hypothetical rent is in a case like the present fixed upon the *sir* land, and all the co-sharers share in this hypothetical rent. It is quite clear that if the proprietary body were the proprietors of the *sir* prior to the sale, the particular co-sharer who sells his proprietary rights cannot transfer anything more than his own share. In other words, he is not entitled to sell the whole proprietary title in the land which he held as *sir*. We think it logically follows that as soon as the co-sharer ceases to be a co-sharer and becomes an ex-proprietary tenant of his *sir*, he becomes the tenant of all the co-sharers in the *patti* including the purchaser of his share. The plaintiffs were therefore entitled to share in the rent payable by the defendants 2 to 4. It is to be noted that this is not a case where the vendor is really the sole owner of the proprietary title in the lands which he holds as *sir*. There are some such cases. We dismiss the appeal with costs.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Mr. Justice Muhammad Rafiq.

LANGRIDGE v. ATKINS.*

Criminal Procedure Code, section 179—Jurisdiction—Place where consequence of act ensued—Act No. XLV of 1860 (Indian Penal Code), section 406—Criminal breach of trust.

Held that the loss caused to the person beneficially entitled to property through a criminal breach of trust is a consequence which completes the offence, and a prosecution will therefore lie at the place where such loss occurred.

Queen-Empress v. O'Brien (1) and *Emperor v. Mahadeo* (2) followed. *Babu Lal v. Ghansham Das* (3), *Ganesh Lal v. Nand Kishore* (4) and *Sirdar Meru v. Jethabhai Amirbhai* (5) distinguished. *Nirbhe Ram v. Kallu Ram* (6) dissented from.

The facts of this case were briefly as follows. Two persons of the names of Atkins and Langridge, both married, lived at Cawnpore. Atkins owned a machine and Langridge, under an agreement with Atkins, helped Atkins to work it and was remunerated by a share in the profits. Atkins fell ill at Cawnpore in 1911 and

* Criminal Revision No. 681 of 1912 from an order of W. F. Kirton, Sessions Judge of Cawnpore, dated the 19th of August, 1912.

(1) (1896) I. L. R., 19 All., 111.

(4) (1912) I. L. R., 34 All., 487.

(2) (1910) I. L. R., 32 All., 377.

(5) (1906) 8 Bom. L. R., 513.

(3) Weekly Notes, 1908, p. 115.

(6) (1901) 4 O. C., 373.

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died there in January 1912, leaving by will all his property to his wife. During his illness Langridge had, with Atkins' permission, taken the machine to some place in Madras to be worked at a fair for their common benefit. Langridge neither returned the machine to Mrs. Atkins nor did he account for any profits made out of it. Mrs. Atkins therefore filed a complaint against Langridge in Cawnpore. The present application was to set aside the proceedings against Langridge upon the ground that the courts at Cawnpore had no jurisdiction.

Mr. *E. A. Howard*, for the applicant.

Mr. *C. Dillon*, for the opposite party.

Babu *Lalit Mohan Banerji* (for the Assistant Government Advocate), for the Crown.

MUHAMMAD RAFIQ, J.—This is an application in revision which raises a point of jurisdiction. The applicant, George Langridge, contends that the Cantonment Magistrate of Cawnpore has no jurisdiction to try him on a charge under section 406 of the Indian Penal Code. According to the case for the prosecution, the applicant and Atkins, the husband of the opposite party, were in the service of the East Indian Railway in 1911, and both resided with their wives in Cawnpore. The two men were friends, and they decided to improve their prospects by leaving the railway service and touring the country with an American machine called the "American Circling Wave." Atkins supplied the money for the machine, and he went with the applicant to Bombay in October, 1911, and took delivery of it. The applicant was to serve as an assistant of Atkins, and was to get part of the profits as his remuneration. Atkins remained in Bombay for about three months. He fell ill and died there on the 23rd of January, 1912. Before his death he executed a will of all his property in favour of his wife, Mrs. Atkins. During his illness he permitted the applicant to take the machine to some place in Madras to work it there during a fair for their mutual benefit. A few days after the death of Atkins, the applicant presented an agreement in writing to Mrs. Atkins, for signature, claiming half the machine. Mrs. Atkins refused to sign the said agreement and denied the title of the applicant to any part of the machine. The applicant then went away without returning the machine to Mrs. Atkins or rendering to her any account of the profits made before or after the death of her

husband. She filed a complaint in the court of the Cantonment Magistrate of Cawnpore against the applicant, under section 406 of the Indian Penal Code. Mrs. Langridge, the wife of the applicant, also filed a complaint against him under the maintenance section in the same court. The applicant was arrested on the two warrants and taken to Cawnpore. He objected to the jurisdiction of the Cantonment Magistrate to try him on the charge of criminal breach of trust on the ground that the offence, if committed at all, was committed outside Cawnpore and in fact outside the United Provinces. The objection was overruled. The applicant preferred a revision to the court of Session which was rejected. He has come up in revision to this Court and repeats his objection. It is argued by the learned counsel for him that section 179 of the Code of Criminal Procedure, under which the Cantonment Magistrate appropriates the jurisdiction to himself, and with whom the Judge has agreed, is inapplicable to the present case. The applicant has done no criminal act within the jurisdiction of the Cawnpore courts, nor has any consequence ensued modifying or completing such act within the jurisdiction of those courts. The alleged criminal breach of trust was admittedly committed outside Cawnpore; and as under the law the offence was completed as soon as the dishonest misappropriation or conversion of the machine or the profits had taken place, there was no consequence of the said misappropriation left to modify or complete the offence with which the applicant stands charged. In support of this contention the following cases are cited:—*Babu Lal v. Ghansham Das* (1), *Ganeshi Lal v. Nand Kishore* (2), *Sirdar Meru v. Jethabhai Amirbhai* (3) and *Nirbhe Ram v. Kallu Ram* (4). For Mrs. Atkins it is contended that the jurisdiction of a criminal court is determined by the allegations made in the complaint filed before it. In her complaint she stated that the applicant was a mere agent in charge of the machine in question, permitted to exhibit it at various places for her and her husband's benefit and was bound to return it and to account to her for the profits at her place of residence, i. e., at Cawnpore. His failure to do so gives the courts at Cawnpore jurisdiction to try him on her complaint. It is admitted that the words "and of any consequence which has ensued" in

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(1) Weekly Notes, 1908, p. 115.

(3) (1906) 8 Bom. L. R., 513.

(2) (1912) I. L. R., 34 All., 487

(4) (1901) 4 O. C. 376.

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Mr. E. A. Howard, for the applicant.

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MUHAMMAD RAFIQ, J.—This is an application in revision which raises a point of jurisdiction. The applicant, George Langridge, contends that the Cantonment Magistrate of Cawnpore has no jurisdiction to try him on a charge under section 405 of the Indian Penal Code. According to the case for the prosecution, the applicant and Atkins, the husband of the opposite party, were in the service of the East Indian Railway in 1911, and both resided with their wives in Cawnpore. The two men were friends, and they decided to improve their prospects by leaving the railway service and touring the country with an American machine called the "American Circling Wave." Atkins supplied the money for the machine, and he went with the applicant to Bombay in October, 1911, and took delivery of it. The applicant was to serve as an assistant of Atkins, and was to get part of the profits as his remuneration. Atkins remained in Bombay for about three months. He fell ill and died there on the 23rd of January, 1912. Before his death he executed a will of all his property in favour of his wife, Mrs. Atkins. During his illness he permitted the applicant to take the machine to some place in Madras to work it there during a fair for their mutual benefit. A few days after the death of Atkins, the applicant presented an agreement in writing to Mrs. Atkins for signature, claiming half the machine. Mrs. Atkins refused to sign the said agreement and denied the title of the applicant to any part of the machine. The applicant then went away without returning the machine to Mrs. Atkins or rendering to her any account of the profits made before or after the death of her

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husband. She filed a complaint in the court of the Cantonment Magistrate of Cawnpore against the applicant, under section 406 of the Indian Penal Code. Mrs. Langridge, the wife of the applicant, also filed a complaint against him under the maintenance section in the same court. The applicant was arrested on the two warrants and taken to Cawnpore. He objected to the jurisdiction of the Cantonment Magistrate to try him on the charge of criminal breach of trust on the ground that the offence, if committed at all, was committed outside Cawnpore and in fact outside the United Provinces. The objection was overruled. The applicant preferred a revision to the court of Session which was rejected. He has come up in revision to this Court and repeats his objection. It is argued by the learned counsel for him that section 179 of the Code of Criminal Procedure, under which the Cantonment Magistrate appropriates the jurisdiction to himself, and with whom the Judge has agreed, is inapplicable to the present case. The applicant has done no criminal act within the jurisdiction of the Cawnpore courts, nor has any consequence ensued modifying or completing such act within the jurisdiction of those courts. The alleged criminal breach of trust was admittedly committed outside Cawnpore; and as under the law the offence was completed as soon as the dishonest misappropriation or conversion of the machine or the profits had taken place, there was no consequence of the said misappropriation left to modify or complete the offence with which the applicant stands charged. In support of this contention the following cases are cited:—*Babu Lal v. Ghansham Das* (1), *Ganeshi Lal v. Nand Kishore* (2), *Sirdar Meru v. Jethabhai Amirbhai* (3) and *Nirbhe Ram v. Kallu Ram* (4). For Mrs. Atkins it is contended that the jurisdiction of a criminal court is determined by the allegations made in the complaint filed before it. In her complaint she stated that the applicant was a mere agent in charge of the machine in question, permitted to exhibit it at various places for her and her husband's benefit and was bound to return it and to account to her for the profits at her place of residence, i. e., at Cawnpore. His failure to do so gives the courts at Cawnpore jurisdiction to try him on her complaint. It is admitted that the words "and of any consequence which has ensued" in

(1) Weekly Notes, 1908, p. 115.

(2) (1912) I. L. R., 34 All., 487.

(3) (1906) 8 Bom. L. R., 513.

(4) (1901) 4 O. C. 376.

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section 179 of the Code of Criminal Procedure, refer to a consequence which completes or modifies the act alleged to be an offence. But in criminal breach of trust loss is a necessary consequence and completes the offence. The unlawful retention by the applicant of the machine and profits of its exhibition has entailed loss on Mrs. Atkins at Cawnpore, and hence the courts at Cawnpore have jurisdiction to try him. The learned counsel for Mrs. Atkins relies on the following cases in support of his argument: *Queen-Empress v. O'Brien* (1) and *Emperor v. Mahadeo* (2). Moreover, it is urged that if the applicant's interpretation of section 179 of the Code of Criminal Procedure is allowed, Mrs. Atkins has no remedy. She does not know where the machine was at the time of her husband's death, or at the time she demanded its return, or at what places has the applicant exhibited it. In fact, she could not for a long time trace the address of the applicant and does not know even now where he is concealing the machine. It appears to me that both parties are agreed as to the interpretation of section 179 of the Code of Criminal Procedure. The point of difference between them is whether loss resulting from criminal breach of trust can be said to be such a consequence as completes the offence. This Court, if I have read the rulings rightly, has always held that loss entailed by criminal breach of trust is a consequence that completes the offence. The case of *Queen-Empress v. O'Brien* is directly in point. To the same effect is the case of *Emperor v. Mahadeo*: None of the cases cited for the applicant, with the exception of the Oudh case, helps him. In the case of *Babu Lal v. Ghansham Das* (3) Babu Lal was prosecuted for cheating at the instance of Ghansham Das, in the court of the Joint Magistrate of Aligarh, with regard to the negotiation of certain *hundis*. It was found that as the said *hundis* were neither negotiated in the district of Aligarh, nor was any loss sustained by Ghansham Das on the negotiation of those *hundis*, the Joint Magistrate of Aligarh had no jurisdiction to entertain the complaint. The facts of the case *Ganeshi Lal v. Nand Kishore* (4) were, that the complainant had his principal shop in Cawnpore and a branch shop at Gauriganj, district Sultanpur, in Oudh. The profits made at the latter shop were to be remitted to the principal firm at Cawnpore. The

(1) (1896) I. L. R., 19 All., 111.

(3) Weekly Notes, 1908, p. 115.

(2) (1910) I. L. R., 32 All., 397.

(4) (1912) I. L. R., 34 All., 487.

accused misappropriated some money of the branch shop. The complainant prosecuted him in Cawnpore on the charge of embezzlement. On an objection by the accused it was held by Mr. Justice Karamat Husain that the Cawnpore court had no jurisdiction. The learned Judge came to that conclusion presumably on the ground that loss was sustained primarily by the branch shop. It was for that reason that he made a distinction between the case before him and that of *Queen-Empress v. O'Brien* (1). He did not differ from the ruling in the case of *O'Brien*, nor did he question the proposition that in a criminal breach of trust loss to the victim was a consequence which completed the offence. In the case of *Sirdar Meru v. Jethabhai Amirbhai* (2) the complainant was assaulted by the accused and his leg broken within the Baroda territory. The complainant was taken to a hospital within the British territory where he was detained for 57 days, during which period he was unable to follow his ordinary pursuits. He originally filed in a British court a complaint against the accused for causing him grievous hurt. The accused raised an objection of want of jurisdiction. It was held that as the offence of causing grievous hurt was complete within the Baroda territory, inasmuch as the leg had been fractured in that territory, the objection of the accused must prevail. This case does not help the applicant at all. It is true that the inability of the complainant to follow his ordinary pursuits was a consequence of the fracture. But that inability did not in that particular case complete or modify the offence of the accused. Had the leg of the complainant not been broken and had an injury been caused which necessitated the complainant's detention in a British hospital for twenty days or more, the decision of the Bombay High Court would, I presume, have been different. According to the definition of grievous hurt inability to follow one's ordinary pursuits for twenty days or more is only one of the tests of grievous hurt, vide section 320 of the Indian Penal Code. The Oudh case, as I have already remarked, is in favour of the applicant. But this Court has taken a different view as appears from the cases cited above. I therefore find that the Cantonment Magistrate of Cawnpore is jurisdictionally incompetent to entertain the complaint against the applicant. The application of the applicant fails and is rejected.

(1) (1896) L. L. R., 13 All. 111.

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FULL BENCH.

Before Sir Henry Richards, Knight, Chief Justice, Mr. Justice Sir George Knox, Mr. Justice Banerji, Mr. Justice Tudball and Mr. Justice Chamier.

KHALIL-UD-DIN AHMAD (PLAINTIFF) v. BANNI BIBI (DEFENDANT) *

Act No. XVI of 1908 (Indian Registration Act), sections 31, 32, 52 and 87—Presentation by a person not an authorized agent of the executant—Procedure—Invalid presentation not merely a question of procedure.

Where a document is presented for registration by a person not duly authorized to present it according to the law applicable to registration of documents, such presentation is altogether invalid, and its subsequent registration, made upon the admission of the executant before an officer who had no jurisdiction to accept the document for registration, is likewise invalid. *Mujib-un-nissa v. Abdur Rahim* (1) followed.

THIS was a suit on a mortgage bond for Rs. 7,000, executed by one Musammat Banni Bibi, on the 11th of July, 1893, in favour of Niaz Bibi. Niaz Bibi transferred her rights to the plaintiff appellant, Khalil-ud-din, by a sale deed bearing date the 7th of November, 1896. The bond was taken to the office of the sub-registrar of pargana and district Bareilly by Muiz-ud-din, the husband of Musammat Banni Bibi. The sub-registrar endorsed on it that "the document was presented by Muiz-ud-din on Wednesday the 12th July, 1893," that "he stated that the Musammat was a *pardanashin* lady and that the document may be attested from the Musammat at her residence by means of a commission," and that "as the Musammat lived within the local limits of the Municipality the document may be sent to the departmental sub-registrar of Bareilly for attestation." The document was taken to the residence of the lady the same evening by the departmental sub-registrar who endorsed on it that the document had been attested and that the papers be sent back to the sub-registrar of the tahsil Bareilly. It was admitted that Muiz-ud-din held no power of attorney from Musammat Banni Bibi. The defence to the suit was, *inter alia*, that the document had not been legally registered, as it had not been presented for registration by any authorized person within the meaning of section 32 of the Registration Act. The Subordinate Judge held that the document had not been duly registered and dismissed the suit. The plaintiff appealed to the High Court.

* First Appeal No. 170 of 1911, from a decree of Baij Nath Das, Officiating Subordinate Judge of Bareilly, dated the 10th of March, 1911.

Dr. *Satish Chandra Banerji* (Mr. *Ibn-i-Ahmad*, with him), for the appellant, referred to sections 31, 32, 33 of the Registration Act, XVI of 1908. Section 32 provided that except in cases governed by sections 31 and 89, every document was to be presented in a particular manner. So in cases coming within section 31 it was not necessary to present the document in person. The maxim *qui facit per alium facit per se* applied, and an agent could present the document. So when an application was to be made under section 31, any agent could make it. The question was if 'presentation' meant the physical act of handing in the document or of tendering the document for registration. There were three Privy Council cases on the point. The first was *Sah Mukhun Lall Panday v. Sah Koondun Lall* (1). The observations in this case were explained in the next case of *Mohammed Ewaz v. Birj Lall* (2). There the vendors lived at different places; they did not come together for registration, and the question was if they could appear separately and register the document. Their Lordships held that it could be so registered. It is possible to make a distinction, viz. that presentation is the act of the party and registration that of the officer, but presentation was for registration and the act legally operative and indispensable was that of registration. The last Privy Council case was *Mujib-un-nissa v. Abdur Rahim* (3). There the principal was dead when the document was presented. There was no invocation of the registrar by anyone having anything to do with the deed. Here it was different. The deed was registered at the instance of the lady before whom the document was taken, who identified it, admitted execution and who asked for its registration. The decision in 23 Allahabad did not affect the present case. With the object of satisfying the sub-registrar that there was special cause within the meaning of section 31, the husband may have taken over and shown the document. If he handed it over, that was an act without legal effect, and should not be taken into account. Strictly speaking the sub-registrar should have returned the document. Instead of that he kept it with him and took it to the lady. The error of the sub-registrar was nothing more than a defect in procedure.

(1) (1875) 2 I. A., 210; 24 W. R., 75.

(2) (1877) 4 I. A., 166; I. L. R.,

1 All., 465.

(3) (1900) I. L. R., 23 All., 233.

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All that the law requires is that the document should be before the sub-registrar and he is to be requested to accept it for registration. The cases in this court were, *Ikbāl Begum v. Sham Sunder* (1), following another in the same volume, *Har Sahai v. Chunni Kuar* (2) and *Hardei v. Ram Lal* (3). This last was considered by the Privy Council in 23 All., and the actual decision must be considered to be overruled by it. Other cases were *Wilaiti Begam v. Fazal Husain Khan* (4) and *Nath Mal v. Abdul Wahid Khan* (5). It was admitted that the *karinda* presenting did not possess the required power of attorney. In another case—*Ram Chandra Das v. Farzand Ali Khan* (6)—there was no evidence to show that he did not. The only difference between *Nath Mal's* case and this was that there the mortgagor was present whereas here the lady was not. But what happened in the presence of the lady had to be taken into consideration. In *Jambu Prasad v. Aftab Ali Khan* (7) it was not proved that the executants were present when the registrar took in the deed and registered it. Another case was *Ishri Prasad v. Baijnath* (8), where it was held that neither section 31 nor 89 applied. When it is a case under section 31, the law does not require that it is any particular kind of agent who should invoke the registrar. The observations of Lord HALSBURY in *Quinn v. Latham* (9), show that the observations of the Privy Council in 23 All. were to be restricted to the facts of that particular case. If presentation by the husband was at all a presentation, it should be ignored. "Present" is used in section 32 in a technical sense, and is not merely equivalent to handing in; what happened subsequently satisfied the requirements of law, and if the sub-registrar thought that the husband had presented the document and endorsed it to that effect, it was merely a defect in his procedure and could be cured by section 87. The cases in 4 All. show that the mortgagor is estopped from disputing the validity of the registration.

Mr. B. E. O'Connor (Babu Lalit Mohan Banerji with him), for the respondent.

(1) (1882) I. L. R., 4 All., 384.

(5) (1912) I. L. R., 34 All., 355.

(2) (1882) I. L. R., 4 All., 14.

(6) (1912) I. L. R., 34 All., 253.

(3) (1889) I. L. R., 11 All., 319.

(7) (1912) I. L. R., 34 All., 331.

(4) (1912) 9 A. L. J., 148.

(8) (1906) 1 L. R., 28 All., 707.

(9) [1901] A. C., 495. (506).

The facts were not disputed. The two processes were performed separately. The husband presented the document to the registrar, who endorsed that fact on it, and then he went to the lady's house to register it.

It is true that the lady was an assenting party to the registration with full knowledge of what was being done ; but the question was if in the present view of the law the fact that it was not properly presented was not fatal to it. There were two essential processes incidental to registration, (1) presentation, and there had to be a record made of it ; (2) the registrar having been put in motion by a proper presentation he proceeds to the formal registration. Going back to the history of registration we have Act XX of 1866, consolidating the law of registration. All Acts since follow each other closely---those in 1871, 1877 and 1908---both in parts and in the language used. The endorsement of presentation is mentioned in all these Acts, and the provisions are not novel, the conditions are looked upon as essential. Section 31 is in part V and section 32 in part VI of the Act. In part V are grouped together all the provisions relating to the place of registration, and in part VI there are put together provisions which relate to the mode of registration, and section 31 relates to the place of it. Part V itself is in two parts. The first says that only in a proper office can a document be registered. But there is a provision in section 33 itself for cases when the registrar goes to the abode of a person wishing to present a document for registration. In the second we have the procedure the registrar has to follow. As between the first paragraph of section 31 and the first part of 32, there is no conflict. In the second part we have the persons who are to make the presentation. There are three classes of persons. Sections 31 and 32 are not mutually exclusive. Section 31 contemplates that nothing in the shape of presentation is to take place at the office, if the registrar goes to the abode of person wishing to register. It does not alter the formalities. The Privy Council lay stress in 23 All. on section 32, a person not authorized cannot present. If it were merely a matter of procedure it would only authorize the registrar to go to the place asked and register the deed. There is a regular series of steps to be followed. He must act in pursuance of the Act. Failure to do so is not merely a defect of procedure. If it was not necessary

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that presentation should be by the right person, it would not be necessary to specify the persons who could do it. Anybody might do it then. What was done could not be wiped off. The case in 23 Allahabad was authority for the proposition that registration following on a bad presentation was illegal. Presentation was not defined anywhere; but see *Birtlett v. Holmes* (1). Besides the person who actually went to the lady's house was only a commissioner and the document could not be presented to him. He acted merely as a post office. The lady never came before the sub-registrar at all.

Dr. Satish Chandra Banerji, in reply—(on the last point).

This plea was never taken before. In any case it was a mistake of the sub-registrar and was merely a defect in procedure and could be remedied by section 87. The district registrar had sent the document to the sub-registrar in the case in *Ram Chandra Das v. Furzand Ali Khan* (2) and there it was held to be duly registered.

If the sub-registrar sent some one else here, it was his *bond fide* mistake; why should the parties suffer?

RICHARDS, C. J.—This appeal arises out of a suit brought on foot of a mortgage, dated the 11th of July, 1893. Various defences were pleaded, and amongst other things execution and consideration were denied. The court below has found nearly all the issues in favour of the plaintiff. It has found that the bond was duly executed by Musammat Banni Bibi, the mortgagor, and that the consideration was duly paid to her. The court, however, somewhat reluctantly found that the bond had not been duly registered. This question of registration was the question which came before a Bench of this Court. It appears that on the day on which the mortgage purports to have been registered, the husband of Musammat Banni Bibi made an application to the sub-registrar of Bareilly tahsil. The actual application is not before us but there is endorsed on the bond the following note:—

“ This document was presented by Muiz-ud-din Ahmad on Wednesday, the 12th July, 1893, between 8 and 9 a. m., in the office of the sub-registrar of pargana and district Bareilly. He stated that Musammat Banni Bibi, the executant of the document, was a *parda-nashin* lady. The document may be attested from the Musammat at her residence by means of a commission. As the Musammat

(1) (1853) 22 L. J. Q. P., N. S., 182, 185. (2) (1912) I. L. R., 34 All., 253.

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pointed out, that the departmental sub-registrar had no such authority, and the question which it was intended to have decided by this Bench does not really arise. It seems to me that we have now only to decide whether or not the "presentation" which was made by the husband can, from any point of view, be regarded as a good "presentation," and secondly, whether the fact, that the registrar received the deed for registration from an unauthorized person, is merely a defect of procedure which might be disregarded under the provisions of section 87. It seems to me that the "presentation" by Muiz-ud-din Ahmad was a complete nullity. He had no authority whatever to present the document for registration, and in my opinion this question is completely covered by the ruling of their Lordships of the Privy Council in the case of *Mujib-un-nissa v. Abdur Rahim* (1). I am also of opinion that under no circumstances can what subsequently happened at the house be deemed a good presentation, because the gentleman who attended at the house had no authority to receive the document for registration. His authority was confined to ascertaining that the document had been duly executed, that is to say, to examining the executant under the provisions of section 38. I would dismiss the appeal.

KNOX, J.—I concur and have nothing further to add.

BANERJI, J.—I also agree in the conclusion at which the learned Chief Justice has arrived. In the case decided by the Privy Council namely, the case of *Mujib-un-nissa v. Abdur Rahim*, their Lordships observed :—"It is clear that the power and jurisdiction of the registrar only come into play when he is invoked by some person having a direct relation to the deed. It is for those persons to consider whether they will or will not give to the deed the efficacy conferred by registration. The registrar could not be held to exercise the jurisdiction conferred on him if, hearing of the execution of a deed, he got possession of it and registered it, and the same objection applies to his proceeding at the instigation of a third party, who might be a busybody." In the present case the document was not presented for registration by a person having a direct relation to the deed, and the subsequent admission of execution by the executant was before an officer who had no jurisdiction to accept the document for registration. Therefore there was no presentation to a sub-registrar having jurisdiction, and the

(1) (1900) I. L. R., 23 All., 233.

registration of the document must, according to the ruling of the Privy Council, be held to be invalid. I also would dismiss the appeal.

TUDBALL, J.—I fully concur and have nothing further to add.

CHAMIER, J.—I agree with the order proposed by the learned Chief Justice. It appears to me that there was neither in fact nor in law any "presentation" of the document by any qualified person to any person authorized to receive it for registration.

By THE COURT.—The order of the Court is that the appeal is dismissed, but without costs. The objection raised by the respondent as to costs is also dismissed with costs.

Appeal dismissed.

PRIVY COUNCIL.

RAGHUBIR SINGH (DEFENDANT) v. MOTI KUNWAR (PLAINTIFF) AND SATI SINGH AND ANOTHER (PLAINTIFFS) v. MOTI KUNWAR (DEFENDANT).

Two appeals consolidated.

[On appeal from the High Court of Judicature at Allahabad.]

Hindu law—Partition—Requisites for partition—Agreement to hold property in certain specific and defined shares, effect of—Re-union, failure to prove as alleged.

The members of a joint Hindu family came to the following agreement:—
"Now we have already come to terms, and according to the shares given below we have been in possession and enjoyment of our respective shares. As regards it we have with our mutual consent entered into an agreement according to the terms given below. The same share in the property which is in the possession of a particular person as given below shall be considered to be the property of that very person who is in possession thereof. If any of us brings any suit in the Civil or Revenue Court to the effect that his share is less or he is a loser, it shall be considered to be false in every court. By virtue of this agreement no person shall be competent to bring any claim in any court in respect of any portion of the property other than the property detailed below." Then followed a specification of the villages belonging to the family, and the shares in which those villages were thereafter to be held. From that time the property had been entered in the Register in accordance with the arrangement contained in the agreement, and the agreement had been acted upon up to the time of suit.

Held by the Judicial Committee (affirming the decision of the High Court) that on the evidence and circumstances of the case, the agreement was one which operated as a partition of shares, and the family thenceforth ceased to be joint in accordance with the principle laid down in *Appovier v. Rama Subba*

* *Present*:—Lord Macnaghten, Lord Moulton, Sir John Edgo and Mr. Ameer Ali,

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Aiyan (1); *Balkishen Das v. Ram Narain Sahu* (2) and *Parbati v. Naunihal Singh* (3).

There was no re-union. That was a question of fact, and there was no evidence to show that any of the members of the family re-united, or even contemplated re-union.

Two appeals consolidated from two judgements and decrees (24th November 1908) of the High Court at Allahabad, one of which reversed a judgement and decree (12th September 1907) of the Subordinate Judge of Mainpuri, and the other affirmed a judgement and decree (2nd June 1904) of the Assistant Collector of Etawah.

The facts of the case are, for the purposes of this report, stated in the judgement of their Lordships of the Judicial Committee.

The main question for determination in these appeals, was whether one Baldeo Singh, the deceased husband of the respondent Moti Kunwar, was a member of a Hindu joint family in co-parcenership with the appellants at the time of his death (as contended by the appellants), or had become separated prior to his death (as contended by the respondent).

Upon this question depended the title of Moti Kunwar, the plaintiff in the suit brought in the court of the Assistant Collector of Etawah, the object of which was to recover her share of profits of a village named Kanchausi, which was recorded in her name. The defendants were the present appellants, and the main defence was that Moti Kunwar was not a co-sharer, but a Hindu widow in a joint family who was only entitled to maintenance. The Assistant Collector decided the case on the provisions of the Agra Tenancy Act (II of 1901 of the Local Council) section 201, and held that the fact that Moti Kunwar's name was recorded as proprietor in the Revenue papers was sufficient to maintain her claim in a Revenue Court. He accordingly gave her a decree, and directed the parties to go to a Civil Court with respect to the question of title.

The appellants consequently brought the other suit in the court of the Subordinate Judge of Mainpuri against Moti Kunwar, claiming a declaration that they were the owners of the property

(1) (1866) 11 Moo., I. A., 75.

(2) (1903) I. L. R., 30 Calc., 738; L. R. 30 I. A., 139.

(3) (1909) I. L. R., 31 All., 412; L. R. 36 I. A., 71.

wrongly recorded in the name of Moti Kunwar, their title being that they were the surviving members of the joint family of which Baldeo Singh (Moti Kunwar's deceased husband) had been a co-parcener. Moti Kunwar contested the suit on the same title as she had set up in her own suit.

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The Subordinate Judge deciding in favour of the appellants said :—

"The question is whether by this agreement Baldeo Singh and Lalta Singh intended a division with Madan Mohan Singh alone, or whether it was their intention to divide amongst themselves and also from Raghunath Singh and Sati Singh. There is strong oral and documentary evidence to show that Baldeo Singh, Lalta Singh, Raghunath Singh and Sati Singh remained joint after the agreement. The former consists of the evidence of (1) relatives, (2) respectable persons, big zamindars and *raises*, and (3) servants, of the family. The documentary evidence consists of the admission of Baldeo Singh contained in a statement made before the Tahsildar on the 28th of April 1894, wherein he admits that he had divided from Madan Mohan Singh 11 years ago, but lived jointly with Lalta Singh, Raghunath Singh and Sati Singh; the admission of the defendant Moti Kunwar contained in her deposition before the Tahsildar in 1896, wherein she states :—'I have got my name entered for my satisfaction. All were joint during the life-time of Thakur (her husband); they are all joint even now. Lalta Singh and Sati Singh are the owners; they will be owners after me as they are the owners now. There is no disunion amongst us.' The accounts written by Baldeo Singh showed joint collections of rent and payment of Government revenue as also that the expenses connected with the illness and the death of Raghunath Singh and those connected with the funeral of Baldeo Singh and the marriage of his daughter after his demise were made out of joint funds."

Moti Kunwar appealed to the High Court from that decision; and Raghubir Singh appealed from the decision of the Assistant Collector of Etawah. The appeals were heard together by a Divisional Bench of the High Court (SIR JOHN STANLEY, C. J. and BANERJI, J.) which reversed the decree of the Subordinate Judge, and affirmed that of the Assistant Collector, on the ground that Baldeo Singh had become separated from the joint family in his life-time.

In the suit in which he was defendant Raghubir Singh obtained special leave of His Majesty in Council to appeal. In the suit in which he and Sati Singh were plaintiffs they appealed in the ordinary course.

On these appeals,

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De Gruyther, K. C., and *B. Dube* for the appellants contended that the agreement, dated the 10th of October 1873, was executed to effect a separation in estate of Madan Mohan Singh alone, and was inoperative as regarded the other members of the family. The evidence showed that after the date of the agreement the parties to it continued to live as undivided members of a Hindu joint family. But even if the agreement did technically operate as a partition of the joint family, the acts, admissions and conduct of the parties, it was submitted, established that there was a re-union between Baldeo Singh, Lalta Singh and Sati Singh, who afterwards lived together as members of a Hindu joint family. Reference was made to Mayne's Hindu law (7th ed.), page 671, section 495 : *Balkishen Das v. Ram Narain Sahu* (1) : Evidence Act (I of 1872), sections 18 and 45 : *Rewa Prasad Sukal v. Deo Dutt Ram Sukal* (2) : *Gajendar Singh v. Sardar Singh* (3); and *Hoolash Kooer v. Kassee Proshad* (4) to show that the recording of the name of a widow, or of a member of a joint family as proprietor of a share did not operate as a separation in title : *Parbati v. Naunihal Singh* (5); Agra Tenancy Act (II of 1901 of the Local Council) section 201 : and the United Provinces Land Revenue Act (III of 1901 of the Local Council) section 144. The view taken by the Subordinate Judge (who heard the witnesses and could best estimate the value of the evidence given by them) was the correct one, and his decision should not have been reversed by the High Court.

Ross, K. C. and *G. Considine O'Gorman* for the respondent contended that it was established by the evidence and by the agreement of 1873, that Baldeo Singh was not a member of the joint family at the time of his death, but had become separated prior to that event. As to the effect of the agreement they relied on the cases of *Balkishen Das v. Ram Narain Sahu*, and *Parbati v. Naunihal Singh* (5); and Mayne's Hindu law (7th ed.),

(1) (1903) I. L. R., 30 Cal., 738 (750) : L. R., 30 I. A. ; 139 (150).

(2) (1899) I. L. R., 27 Cal., 515 (519) : L. R., 27 I. A., 39 (41).

(3) (1896) I. L. R., 18 All., 176 (182).

(4) (1881) I. L. R., 7 Cal., 369 (371).

(5) (1909) I. L. R., 31 All., 412 (425) : L. R., 36 I. A., 71 (76).

page 672. The decision of the High Court was right and should be upheld.

De Gruyther, K. C., replied.

1912, November 26th :—The judgement of their Lordships was delivered by LORD MACNAGHTEN :—

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These are consolidated appeals from a judgement and two decrees of the High Court of Allahabad pronounced in favour of the respondent Musammât Moti Kunwar.

In the Court of the Assistant Collector of Etawah, Moti Kunwar, widow of Baldeo Singh who died in 1895, succeeded in making good her claim to arrears in respect of a specific share of property which undoubtedly at one time formed part of the joint property of an undivided Hindu family to which her husband belonged. Thereupon the appellants, who alleged that Baldeo Singh was not separated at the time of his death, brought a suit in the court of the Subordinate Judge of Mainpuri and obtained a declaration that they were the absolute owners of the property claimed by Moti Kunwar and that she had no right of ownership therein, but merely a right to maintenance. There was an appeal to the High Court by Moti Kunwar against the decree of the Subordinate Judge and an appeal by the present appellants against the order of the Assistant Collector. The two appeals were consolidated. The High Court reversed the decree of the Subordinate Judge and dismissed the suit of the present appellants, as well as their appeal against the order of the Assistant Collector.

The whole controversy depends upon the question whether Baldeo Singh was separate in title and interest at the time of his death.

In 1871, Madan Mohan Singh, who was a member of the undivided family, separated and received his share. For the purpose of this transaction and in settlement of all disputes "relating to the zamindari, the household articles, and the money-lending business, &c.," an agreement was executed on the 19th of December 1871 by Baldeo Singh, Lalta Prasad the adopted son of a deceased member of the undivided family, and Madan Mohan Singh. On the 10th of October 1873 another agreement was executed between and by Baldeo Singh, Lalta Prasad and Madan Mohan Singh. After declaring that the executants along with

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Raghunath Singh and Sati Prasad were sharers in the villages specified below, the agreement proceeded as follows :—

"Now we have already come to terms, and according to the shares given below we have been in possession and enjoyment of our respective shares. As regards it we have with our mutual consent entered into an agreement according to the terms given below.

"The same share in the property which is in the possession of a particular person as given below shall be considered to be the property of that very person who is in possession thereof. If any of us brings any suit in Civil or Revenue Court to the effect that his share is less or he is a loser, it shall be considered to be false in every Court. By virtue of this agreement no person shall be competent to bring any claim in any court in respect of any portion of the property other than the property detailed below."

Then, after some provisions which it is not necessary to set out, there followed a specification of the villages belonging to the family and the shares in which those villages were thereafter to be held. The agreement was registered on the same day. From that time the property has been entered in the register in accordance with the arrangement contained in the agreement. And on the death of Baldeo Singh his share was entered in the name of his widow, the respondent Moti Kunwar.

From the terms of the agreement of 1873, the learned Judges of the High Court rightly, as it appears to their Lordships, "gather that the members of the family were in separate possession of defined shares of the family property before the date of its execution" and they also gather from it "that Raghunath Singh as well as Sati Prasad," who was then a minor, so far as the latter could assent to an arrangement, had agreed to the allotment of shares specified in the instrument." The learned Judges further point out that the khewats of two of the villages specified in the agreement of 1873, which were in evidence, show that at the close of 1872, the entry of names was altered and the names of Lalta Prasad, Sati Prasad, Raghunath Singh, Baldeo Singh and Madan Mohan Singh were entered separately in respect of their separate specific shares.

As regards the share of Raghunath, who was not a party to the agreement of 1873, the partition appears to have been accepted and acted upon by him up to the time of his death, which occurred in 1879. On his death the name of his widow was recorded in his place, and she was appointed lambardar of the village which

had been allotted to him. On her death the names of Baldeo Singh, Lalta Prasad and Sati Prasad were entered in her place, not jointly, but in respect of specific shares.

Sati Prasad, as already stated, was a minor at the date of the agreement of 1873, but it appears that on attaining majority he made no objection to it. He seems to have recognised the partition and acted upon it until Moti Kunwar applied for complete partition in the Revenue Court.

The contention on the part of the appellants was (1) that the agreement of 1873 was a partition only as regards the share of Madan Mohan Singh, and that the other members of the family remained joint, or (2) that the other members re-united either immediately or shortly afterwards. There seems to be no foundation for the latter contention, and indeed it was only faintly put forward. Re-union is a question of fact, and there is not a scrap of evidence to show that any members of the family re-united or even contemplated re-union.

In support of their principal contention the appellants put in a mass of parol evidence which was contradicted by parol evidence on the other side. The learned Judges of the High Court thought the parol evidence vague, unsatisfactory and inconclusive.

The High Court also rejected, and in their Lordships' opinion rightly rejected, a petition of Baldeo Singh himself, in which he alleged that Raghunath's widow was entered as owner solely for her consolation. This petition was in answer to an application by the widow to remove him from the office of sarbarahkar, and is irreconcilable with an earlier petition presented by him, in which he distinctly admitted that he paid to the widow the annual profits of her share and that the agreement of 1873 had been acted upon.

The High Court also rejected as unworthy of consideration a document which was referred to as proving that Moti Kunwar herself admitted that the property registered in her name was joint family property. This document purports to be a certified copy of a certified copy of a deposition made by Moti Kunwar in another suit which was not even put to her in cross-examination, although she averred that she had never made an admission to that effect.

The High Court also rejected as inconclusive certain accounts which purported to show that the expenses of the marriage of

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Baldeo Singh's daughter and his funeral expenses were paid out of joint family property.

In conclusion the learned Judges say that it was sufficient for them that an agreement was committed to writing, which was clear and definite in its terms, and they add that that agreement has been shown to have been acted upon up to the present time.

Their Lordships agree in the result at which the High Court arrived. Having regard to the agreement of 1873, they think that the case is concluded by authority. The result is entirely in accordance with the principle laid down by this Board in the judgement delivered by Lord Westbury in *Appovier v. Rama Subba Aiyan* (1) and in the more recent cases of *Balkishen Das v. Ram Narain Sahu* (2) and *Parbati v. Naunihal Singh* (3).

Their Lordships will therefore humbly advise His Majesty that these appeals should be dismissed.

The appellants will pay the costs of the appeals.

Appeals dismissed.

Solicitors for the appellants: *Barrow, Rogers & Nevill.*

Solicitors for the respondent: *Ranken, Ford, Ford & Chester.*

J. V. W.

*P. O.
1912,
November,
7, 29.

ABDULLAH KHAN (DEFENDANT) v. BASHARAT HUSAIN (PLAINTIFF)
AND ANOTHER APPEAL.

Two appeals consolidated.

[On appeal from the High Court of Judicature at Allahabad.]

Mortgage—Redemption—Construction of mortgage as to the terms of redemption—Mortgage and lease to mortgagor contemporaneously granted—Mortgage executed before Transfer of Property Act (IV of 1882) came into force—Mortgagee's security reduced by portion of property being withdrawn—Section 65(a) of Transfer of Property Act—Right of mortgagee to compensation.

The plaintiff (respondent) mortgaged to the defendant (appellant) certain property by a deed, dated the 25th of August 1880, for Rs. 70,000 for eight years. On the 29th of August (and so practically contemporaneously with the mortgage) a lease of the mortgaged property was executed by the mortgagee in favour of the mortgagor at an annual rent of Rs. 4,200, which represented interest on the mortgage debt at the rate of 6 per cent. per annum. The mortgage contained a clause that "it is agreed by mutual consent of the parties that the profits of the property

* *Present*:—Lord Macnaghten, Lord Moulton, Sir John Edge and Mr. Ameer Ali.

(1) (1866) 11 Moo. I. A., 75.

(2) (1903) I. L. R., 30 Calc., 738; I. R., 30 I. A., 139.

(3) (1909) I. L. R., 31 All., 412; I. R., 36 I. A., 71.

mortgaged shall belong to the mortgagee in lieu of the interest on the mortgage money, and I, the mortgagor, shall have no claim for mesne profits. The mortgagee also shall have no right to claim interest on the mortgage money advanced by him." The lease, after reciting the mortgage, referred to a provision in the latter that the mortgagor should be entitled to sell a certain portion of the mortgaged property on condition that he handed over the whole of the proceeds of the sale to the mortgagee in payment of the mortgage debt, and provided that "under the condition whatever sum of money the mortgagor should pay to the mortgagee in a lump sum should be credited and set off against the rent payable under the lease with interest at 8 annas per cent. per mensem." Subsequently three further charges were tacked on to the mortgage, the latest of which was dated the 13th of December 1882. In June 1888, the mortgagor was in arrear with his rent and the mortgagee brought a suit against him on which the mortgagor gave up possession of the property to the mortgagee. In a suit for redemption (the right to redeem not being disputed). *Held* that the mortgagee was entitled under the terms of the mortgage to appropriate the profits of the mortgaged property in lieu of the interest on the mortgage money not paid by the mortgagor. Evidence of preliminary negotiations and previous conversations were not admissible to contradict or vary the terms of the mortgage (Evidence Act, section 92).

Held also that the mortgage and the lease were both parts of one and the same transaction. But there was no inconsistency between the two instruments, nor would there have been any inconsistency if the mortgage itself had contained a provision for granting a lease on the terms upon which the lease was actually granted.

Held further that the original mortgage having been executed before the Transfer of Property Act came into operation, that Act was not applicable, notwithstanding that one of the further charges was executed subsequently to that date. Whatever might be the construction of section 65(a) of that Act (which was cited in support of the mortgagee's claim) he was not on the evidence and under the circumstances of the present case entitled to compensation for any loss or damage occasioned by his security being diminished owing to a portion of the mortgaged property being successfully claimed from the mortgagor.

Two consolidated appeals from a judgement and two decrees (22nd December, 1908) of the High Court at Allahabad, which partly reversed and partly affirmed a judgement and decree (22nd December, 1906) of the Court of the Subordinate Judge of Meerut.

The suit out of which the present appeals arose was one for redemption of a mortgage, in which the right to redeem was not disputed, and the main question was whether the appellant, the mortgagee, who was in possession of the mortgaged property, was entitled to appropriate the profits in lieu of interest under the terms of the mortgage deed, and the circumstances under which it was executed.

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The mortgage deed was dated the 25th of August 1880, and by it the respondent (plaintiff) in consideration of Rs. 70,000 mortgaged a 10 biswa share in mauza Jeola, and a 6 biswa share in mauza Tisang for eight years nominally to Masuma Begam (but really to her husband Husain Ali Khan) now represented by the appellant (defendant). The most important provision of the deed, so far as this appeal is concerned was clause 4, which stipulated that "it is agreed by mutual consent of the parties to this document that the profits of the property mortgaged shall belong to the aforesaid mortgagee in lieu of interest on the mortgage money, and I, the mortgagor, shall have no claim for the mesne profits. The mortgagee shall have no right to claim interest on the mortgage money advanced by him." On the 29th of August 1880, the mortgagee leased the whole of the mortgaged property to the plaintiff for the term of the mortgage at a yearly rental of Rs. 4,200, which represented interest on the mortgage debt at the rate of 6 per cent. per annum.

The lease, after reciting the mortgage, referred to a provision in the latter that the mortgagor should be entitled to sell the abadi of mauza Jeola, on condition that he handed over the whole of the proceeds of the sale to the mortgagee in payment of the mortgage debt, and provided that under that condition "whatever sum of money the mortgagor should pay to the mortgagee in a lump sum, it should be credited and set off against the rent payable under the lease with interest at 8 annas per cent. per mensem."

The mortgage and the lease were both registered on the 2nd of September 1880.

On the 24th of November, 1880, the mortgagor borrowed from the mortgagee Rs. 21,473-8-0 at 12 annas per cent. per mensem in order to purchase a 6 anna share in mauza Tisang. That sum was tacked on to the original mortgage. That purchase was never completed, and the money was attached by one of the judgment-debtors of the mortgagor.

In June, 1881, the mortgagor, being in arrears with payment of his rent, gave up possession under his lease, and the mortgagee re-entered into possession under the terms of the original mortgage deed. According to the mortgagor's case he did this by arrangement with the mortgagee, from whom the mortgagor

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received the following letter:—"After compliments, I beg to inform you that as you have according to the mutual agreement entered into between us, already presented a petition to the Revenue department, Musammat Masuma Begam the mortgagee will now collect the rents from tenants of mauzas Jeola and Tisang herself, and after deducting Rs. 4,200, the remainder will go in payment of the principal and interest of the bond tacked on to the mortgage and the principal of the mortgage. The account begins from to-day. Dated the 11th June 1881." This document was neither witnessed nor registered and was held by the Subordinate Judge to be a forgery. The High Court was of opinion it was genuine; but their Lordships of the Judicial Committee held it to be inadmissible on the ground that it was not registered.

Subsequent to the lease being so determined the mortgagor borrowed two further sums from the mortgagee, which were tacked on to the original mortgage and made redeemable with it; namely, on the 25th of April 1882, Rs. 6,000 repayable with interest at 10 annas per cent. per mensem, and on the 13th of December 1882, Rs. 1,000 repayable with interest at 12 annas per cent. per mensem.

The appellant was the successor in title of the original mortgagee under a deed of gift, dated the 9th of September 1890.

The suit was brought on the 30th of June 1906, the plaintiff after stating the facts praying that the defendant should be ordered to render an account, as from the 11th of June 1881, of the rents and profits of the mortgaged property, and that the plaintiff should be credited in such account with all moneys received by the defendant; that, subject to any amount which might be found to be due, a decree be made in the plaintiff's favour for possession of the property, and that if on adjustment of the account any sum should be found due by the defendant, the plaintiff should be granted a decree for it.

The defendant denied that the oral agreements as alleged were entered into and that Husain Ali Jan was any party to the various transactions except in his capacity as general attorney for his wife; that the terms set out in the deeds were the only terms on which the parties agreed to be bound; that any oral or other agreements purporting to qualify the rights and liabilities under the registered deeds, had been entered into by Husain Ali Jan without any authority and were not binding on the mortgagee, nor could they

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affect the rights of the defendant under those deeds ; that the lease was admitted and that the plaintiff gave up possession under it ; but it had no connexion with nor formed part of the original mortgage, but that on the contrary, it was a distinct and separate transaction, and had, now it had come to an end, no bearing on the rights of the parties, and that at the date the original mortgage was made the plaintiff led the mortgagee to believe that he was the sole owner of the property mortgaged, but that in collusion with his sister he caused her to bring a claim whereby the mortgagee lost possession of a considerable portion of the mortgaged property, and the rents and profits which would have accrued therefrom. Finally the defendant stated that he had no objection to the redemption sued for, on payment of the sums due under the original mortgage and the subsequent amounts tacked on to it, which he estimated to amount to Rs. 2,10,954.

The Subordinate Judge held that the mortgage and the lease were to be treated as separate transactions and that no extraneous evidence was admissible to prove that the mortgagee was only entitled to interest at 6 per cent. per annum under the mortgage deed of the 25th of August 1880 ; that there was no agreement that the mortgagee would charge interest at 8 annas per cent. per mensem, but that the lease money was to be the profit of the mortgagee as long as the lease should last ; that the *rukka* produced in support of the agreement made in June 1881, was a forgery ; that if any such agreement had been made it would have been binding on the mortgagee ; that the mortgagee was aware that the plaintiff's sister's share was included in the mortgage and the defendant was not entitled to claim any damages by reason of such share having been lost ; that all bonds (the principal mortgage bond and the three additional bonds) must be liquidated both as to principal and interest before redemption ; and that the mortgagee was entitled to enjoy and appropriate the entire usufruct of the property from July 1881 and onwards, and that he could not be called upon to account for the same.

The decree was consequently partly in favour of the plaintiff and partly in favour of the defendant.

Both parties appealed to the High Court, and the appeals were heard by SIR JOHN STANLEY, C. J. and BANERJI, J. They were.

of opinion "that the mortgage and the lease must be read together as forming one transaction the mortgage was in fact usufructuary only in name, and that it was not intended at the date of its execution that the mortgagee should go into possession or receipt of the rents and profits. It was only when the mortgagor failed to pay the rent reserved by the lease that possession was taken Reading the mortgage and the lease together we cannot give to the provision in the mortgage deed as to the acceptance of profits in lieu of interest its literal meaning. The language of this provision must be taken to be controlled by the terms of the lease, which provided that during the subsistence of the mortgage rent at the rate of Rs. 4,200 a year should be payable We think that the mortgage and the lease being one transaction the intention of the parties to be deduced from them was that the mortgagee if in possession, was to receive Rs. 4,200 annually as interest out of the rents and profits, and that the mortgagor should enjoy the balance. It was never the intention of the parties that the mortgagee if he took possession should put into his own pockets at least Rs. 2,000 a year over and above the Rs. 4,200."

The appeal of the plaintiff was consequently allowed and that of the defendant was dismissed.

The defendant appealed from both decrees to His Majesty in Council.

On this appeal.

DeGruyther, K. C., and *G. Considine O'Gorman* for the appellant contended that under the terms of the mortgage deed he was entitled to appropriate the whole of the income from the mortgaged property in lieu of interest; and that the respondent was not entitled to an account of the income. No oral or other evidence was admissible to explain the terms of the mortgage deed, which were quite clear in favour of the appellant's contention. The mortgage deed and the lease were distinct and separate transactions, and the High Court, it was submitted, had wrongly held that they should be read together as forming one transaction. In any case the lease having been determined could now have no bearing on the rights and liabilities of the parties, which must be governed solely by the terms of the mortgage deed. The *rukka*,

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dated the 11th of June 1881, was not proved and the High Court erred in reversing on that point the decision of the Subordinate Judge; but even if it were proved to be genuine, it was, being an unregistered document, not admissible in evidence so as to affect immovable property, and had been wrongly admitted by the High Court. It was also contended that the appellant was entitled to compensation for the loss of income occasioned by the withdrawal of the respondent's sister's share of the mortgaged property. Reference was made to the Evidence Act (I of 1872), section 92; Registration Act (III of 1877) sections 17 and 49; and Transfer of Property Act (IV of 1882), section 65 (a) which, it was contended, was applicable. The decision of the High Court should be reversed, and that of the Subordinate Judge (so far as it was not adverse to the appellant) should be restored.

Sir Erle Richards, K. C., and *B. Dube* for the respondent contended that the mortgage deed and the lease formed together one transaction, and that they should be so treated. The evidence produced to show what was the real intention of the parties was therefore rightly admitted by the High Court in proof of the mode in which the rents and profits of the mortgaged property were to be dealt with. The appellant had only got possession of the property in June 1881. Reference was made to *Jawahir Singh v. Someshwar Dat* (1) and *Bulkishen Das v. Legge* (2). The *rukka* of the 11th of June 1881, it was submitted, was properly admitted by the High Court. Under the circumstances the appellant had no right to any compensation for any loss or damage occasioned by the reduction of his security owing to a portion of the mortgaged property being found not to belong to the mortgagor. The Transfer of Property Act, it was contended, did not apply, the mortgage having been executed before that Act came into operation.

DeGruyther, K. C., replied.

1912, November 29th :—The judgement of their Lordships was delivered by LORD MACNAGHTEN :—¶ The respondents in these consolidated appeals are the representatives of the late plaintiff Saiyid Basharat Husain, now deceased, who was the owner of valuable zamindari property, subject to a mortgage, dated the 25th of August 1880, and three further charges tacked to it. The mortgage of 1880 and these further charges are now vested in the appellant.

(1) (1905) I. L. R., 28 All., 225.

(2) (1899) I. L. R., 22 All., 149.

The controversy in this case arose out of these mortgage transactions. The original mortgagee was Husain Ali Khan, who made the advances to Basharat Husain, and took the securities in the name of his wife.

Basharat Husain brought a suit for redemption. His right to redeem was not disputed. The only question was as to the terms and conditions on which the decree for redemption should be made.

On the part of the appellant it was maintained that the rights of the parties must be governed by the provisions of the mortgage deed of 1880, which was duly executed and duly registered. On the other hand, the mortgagor contended, (1) that the real intention of the parties was to be gathered, not from the mortgage deed, but from negotiations and conversations alleged to have taken place before the mortgage was executed; and (2) that on the mortgagor relinquishing the mortgaged property, which had been leased to him immediately after the date of the original mortgage, an agreement was come to between the mortgagee and the mortgagor as to the mode in which the rents and profits of the property were to be dealt with. The only evidence produced in support of this alleged agreement was a letter or *rukka*, neither registered nor witnessed, purporting to be dated the 11th of June 1881, and to be signed by the mortgagee (who died in 1886, ten years before the institution of the suit). The Subordinate Judge of Meerut, who was the Trial Judge, came to the conclusion that the document in question was a forgery. The learned Judges of the High Court considered it genuine and gave effect to it. It is not necessary for their Lordships to determine whether the document is genuine or not. By the provisions of the Registration Act (Act III of 1877) such a document being unregistered is inadmissible in evidence.

As regards the first contention on the part of the mortgagor, which appears to have been argued at great length in the Courts below, it seems impossible to support the decision of the High Court. It is no more permissible in India than it is in this country to contradict or vary the express and unambiguous terms of a written instrument by reference to preliminary negotiations or previous conversations. The Indian Evidence Act is clear on the point.

The consideration for the mortgage of 1880, was the sum of Rs. 70,000. The mortgage was expressed to be for the term of

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eight years. The mortgage deed contains the following statement:—

"It is agreed by mutual consent of the parties to this document that the profits of the property mortgaged shall belong to the aforesaid mortgagee in lieu of the interest on the mortgage money, and I, the mortgagor, shall have no claim for mesne profits. The mortgagee also shall have no right to claim interest on the mortgage money advanced by him."

The mortgagee relied on this provision. The learned Judges of the High Court refused to give it any effect, holding that the mortgage was usufructuary only in form, and that the security was intended to be a simple mortgage carrying interest at the rate of 6 per cent. per annum. In coming to this conclusion the learned Judges seem to have been influenced both by the preliminary negotiations to which the mortgagor and his witnesses deposed, and by the circumstance that by a deed practically contemporaneous with the mortgage, the property was leased to the mortgagor for the period of the mortgage on very favourable terms at a rent which worked out at 6 per cent. per annum on the sum secured. The net profits of the property in mortgage were apparently not less than Rs. 6,000. The rent reserved was only Rs. 4,200. Favourable as the terms were, the mortgagor very soon fell into arrear. The mortgagee brought a suit against him, and he then gave up possession to the mortgagee. It may be that if the mortgage deed means what it says, it would have been better for him to have fought the case out. Such is evidently the view of the High Court. But after all, that is no concern of the Court. It was for the mortgagor to judge what was the wisest course for him to pursue.

Having regard to the eagerness of wealthy money-lenders to obtain security on zamindari property, and the competition among them for a position thought so advantageous, there does not seem to be anything strange in the apparently easy terms of the first mortgage transaction between the lender and the borrower.

Their Lordships agree with the High Court in thinking that the mortgage and the lease were parts of one and the same transaction. But there is no inconsistency between the two instruments. Nor would there have been any inconsistency if the mortgage itself had contained a provision for granting a lease on the terms upon which the lease was actually granted.

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One point was raised by the mortgagee before the Subordinate Judge on which he failed. It was not dealt with by the learned Judges of the High Court because they were against the mortgagee on the main question. The point was raised again before this Board. It was this: Part of the property expressed to be mortgaged was withdrawn from the security in consequence of a successful claim to it by the mortgagor's sister. The mortgagee claimed damages or compensation for the diminution of his security. The Subordinate Judge rejected that claim, being of opinion that the mortgagee when he took his security was aware of the circumstances of the property and the position of the mortgagor's family. Their Lordships think that the Subordinate Judge was right. They consider that the Transfer of Property Act, Act IV of 1882, section 65(a), on which reliance was placed (whatever the construction of that section may be) can have no application to the present case where the mortgage was executed before the date of the Act, though one of the further charges was subsequent to it.

Their Lordships will humbly advise His Majesty that the appeals should be allowed, the orders of the High Court discharged with costs (any costs paid thereunder being repaid), and the order of the Subordinate Judge restored.

The respondents will pay the costs of the appeals.

Appeals allowed.

Solicitors for the appellant :—*Ranken, Ford, Ford & Chester.*

Solicitors for the respondent :—*Barrow, Rogers & Nevill.*

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REVISIONAL CRIMINAL.

Before Mr. Justice Muhammad Rafiq.

EMPEROR v. RAM PRASAD AND ANOTHER.*

*Act No. XLV of 1860 (Indian Penal Code), section 199—Sanction to prosecute—
Prosecution based on alleged false declaration—Declaration inadmissible in
evidence.*

A declaration, before it can be made the foundation of a prosecution under section 199 of the Indian Penal Code, must be one which is admissible in evidence, and which the court before which it is filed is bound or authorized by law to receive in evidence.

The facts of this case were as follows :—

On the 19th of February, 1912, three complaints were filed in the court of the City Magistrate of Cawnpore, namely, (1) Musammat Rupia v. Ram Dial and Ram Sahai, (2) Ram Dial v. Gauri Shankar, (3) Ram Sahai v. Gauri Shankar. The learned City Magistrate transferred the three complaints to a Bench of Honorary Magistrates, composed of Nawab Khakan Husain and Pandit Kundan Lal, for disposal. There were several postponements during the trial of the three cases, and on the 21st of May, 1912, charge sheets were framed. On the 31st of May, 1912, three applications were filed in the court of District Magistrate of Cawnpore, by Ram Sahai and Ram Dial, for the transfer of the three cases from the Bench of the Honorary Magistrates to some other court. The applicants for transfer made certain allegations against the Honorary Magistrates. The three applications were accompanied by three declarations, the latter being made by Ram Prasad, Puttan Lal and Ala Bakhsh. The three declarations were not sworn to before any officer of a court. The District Magistrate called upon the Honorary Magistrates for an explanation, which was submitted on the 26th of June, 1912. On the 29th of June, 1912, an order of the transfer of the three cases to the court of the City Magistrate was made. On the 1st of July, 1912, the opposite party, namely, Musammat Rupia and Gauri Shankar, objected to the order of transfer on the ground that no notice of the application for transfer had been given to them. The District Magistrate cancelled his order of the 29th of June, 1912, and fixed the 6th of July, 1912, for the hearing and disposal of the transfer applications. On

* Criminal Revision No. 581 of 1912 against an order of H. Bomford, District Magistrate of Cawnpore, dated the 30th of July, 1912.

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that date some oral evidence was recorded by the District Magistrate and an order of transfer was made. On the 15th of July, 1912, Pandit Kundan Lal and Nawab Khakan Husain, the Honorary Magistrates, addressed a letter to the District Magistrate, denying the allegations contained in the three declarations of Ram Prasad, Puttan Lal and Ala Bakhsh, and submitting their own affidavits contradicting the said declarations. After hearing the parties concerned the learned District Magistrate sanctioned the prosecution of Ram Prasad, Puttan Lal and Ala Bakhsh, under section 199 of the Indian Penal Code. Against this order Ram Prasad applied in revision to the High Court.

Mr. C. Dillon (with Mr. W. Wallach), for the applicants.

Babu Satya Chandra Mukerji, for the opposite parties.

MUHAMMAD RAFIQ, J.—This is an application in revision, praying that the order of the District Magistrate of Cawnpore, dated the 30th of July, 1912, sanctioning the prosecution of the applicants under section 199 of the Indian Penal Code be set aside. The circumstances which led to the grant of the sanction are as follows:—On the 19th of February, 1912, three complaints were filed in the court of the City Magistrate of Cawnpore, namely, (1) Musammatt Rupia v. Ram Dial and Ram Sahai, (2) Ram Dial v. Gauri Shankar, (3) Ram Sahai v. Gauri Shankar. The learned City Magistrate transferred the three complaints to a Bench of Honorary Magistrates, composed of Nawab Khakan Husain and Pandit Kundan Lal, for disposal. There were several postponements during the trial of the three cases, and on the 21st of May, 1912, charge sheets were framed. On the 31st of May, 1912, three applications were filed in the court of District Magistrate of Cawnpore, by Ram Sahai and Ram Dial, for the transfer of the three cases from the Bench of the Honorary Magistrates to some other court. The applicants for transfer made certain allegations against the Honorary Magistrates. The three applications were accompanied by three declarations, the latter being made by Ram Prasad, Puttan Lal and Ala Bakhsh. The three declarations were not sworn to before any officer of a court. The District Magistrate called upon the Honorary Magistrates for an explanation, which was submitted on the 26th of June, 1912. On the 29th of June, 1912, an order for the transfer of the three cases to the court of City Magistrate was made. On the 1st of July, 1912, the opposite party,

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namely, Musammat Rupia and Gauri Shankar, objected to the order of transfer on the ground that no notice of the application for transfer had been given to them. The District Magistrate cancelled his order of the 29th of June, 1912, and fixed the 6th of July, 1912, for the hearing and disposal of the transfer applications. On that date some oral evidence was recorded by the District Magistrate and an order of transfer was made. On the 15th of July, 1912, Pandit Kundan Lal and Nawab Khakan Husain, the Honorary Magistrates, addressed a letter to the District Magistrate, denying the allegations contained in the three declarations of Ram Prasad, Puttan Lal and Ala Bakhsh, and submitting their own affidavits contradicting the said declarations. After hearing the parties concerned the learned District Magistrate sanctioned the prosecution of Ram Prasad, Puttan Lal and Ala Bakhsh, under section 199 of the Indian Penal Code. It is against this order that the applicant, Ram Prasad, has filed the present application. It is contended by his learned counsel that the order of the learned District Magistrate is *ultra vires*; that no valid ground for granting the sanction has been made out, and that no offence under section 199 of the Indian Penal Code has been committed by the applicant. I shall take up the last objection first. It is admitted by the applicant for the purposes of this application that a declaration was filed by him in the court of the District Magistrate with his application for transfer. It is, however, argued that the declaration was not one which the District Magistrate was bound or authorized by law to receive in evidence and to act upon it, and indeed he did not consider it evidence, for he examined some witness on the basis of whose statements an order of transfer was made. Therefore, if the declaration in question contained any false statement, no offence under section 199 of the Indian Penal Code has been committed. In support of this contention the following cases have been cited:—(1) *In the matter of the petition of Iswar Chunder Guho and others* (1), *Abdul Majid v. Krishna Lal Nag* (2), *Chandi Pershad v. Abdur Rahman* (3). I think that the contention for the applicant must prevail. A declaration, before it can be made the foundation of a prosecution under section 199 of the Indian Penal Code, must be one which is admissible in evidence, and which the court

(1887) 1, L. R., 14 Cal., 653.

(2) (1893) 1, L. R., 20 Cal., 724.

(3) (1894) 1, L. R., 22 Cal., 131.

before which it is filed is bound or authorized by law to receive in evidence. The suggestion that there is no prohibition against the reception of such declaration in evidence does not render it admissible or the declarant amenable to the provision of section 199 of the Indian Penal Code. It is not pointed out for the opposite party that the declaration filed by Ram Prasad was one which under the Criminal Procedure Code, or any other law, the court before which the proceedings were pending was bound or authorized to receive in evidence. I therefore hold that the sanction granted by the learned District Magistrate for the prosecution of the applicant under section 199 of Indian Penal Code, cannot be upheld. It is unnecessary to discuss the other objections taken on behalf of the applicant. I, therefore, set aside the order of the learned District Magistrate, dated the 30th July, 1912, as against Ram Prasad.

Application allowed.

Before Mr. Justice Muhammad Rafiq.

GIGA v. MUHAMMAD AMIN*

Act No. XIII of 1859 (Workman's Breach of Contract Act)—Procedure—Special procedure under the Act not applicable to ordinary loans between master and workman.

Held that the special procedure provided by Act No. XIII of 1859 for the recovery of money advanced in the circumstances therein described is not applicable where money is advanced to a workman, not for the purpose of assisting him to complete a specific piece of work, but as an ordinary loan to be repaid out of the workman's wages. *In the matter of Annisoori Sanyasi (1)* referred to.

The applicant Giga, having employed one Muhammad Amin to work at his shop, lent Muhammad Amin some money under an agreement by which the loan was to be repaid out of Muhammad Amin's wages. Before, however, the loan was repaid, Muhammad Amin left the service of Giga. Giga thereupon filed a complaint against Muhammad Amin under Act No. XIII of 1859 in the court of the Cantonment Magistrate of Cawnpore. The Magistrate referred the matter in dispute to arbitration. The majority of the arbitrators filed an award decreeing the sum of Rs. 51-4 to Giga, and that sum was paid. Giga, however, applied in revision to the Sessions Judge to set aside the order of the Cantonment Magistrate, and failing there, made a further application to the High Court.

* Criminal Revision No. 732 of 1912 from an order of W. F. Kirtton, Sessions Judge of Cawnpore, dated the 7th of September, 1912.

(1) (1904) I. L. R., 28 Mad., 37.

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namely, Musammat Rupia and Gauri Shankar, objected to the order of transfer on the ground that no notice of the application for transfer had been given to them. The District Magistrate cancelled his order of the 29th of June, 1912, and fixed the 6th of July, 1912, for the hearing and disposal of the transfer applications. On that date some oral evidence was recorded by the District Magistrate and an order of transfer was made. On the 15th of July, 1912, Pandit Kundan Lal and Nawab Khakan Husain, the Honorary Magistrates, addressed a letter to the District Magistrate, denying the allegations contained in the three declarations of Ram Prasad, Puttan Lal and Ala Bakhsh, and submitting their own affidavits contradicting the said declarations. After hearing the parties concerned the learned District Magistrate sanctioned the prosecution of Ram Prasad, Puttan Lal and Ala Bakhsh, under section 199 of the Indian Penal Code. It is against this order that the applicant, Ram Prasad, has filed the present application. It is contended by his learned counsel that the order of the learned District Magistrate is *ultra vires*; that no valid ground for granting the sanction has been made out, and that no offence under section 199 of the Indian Penal Code has been committed by the applicant. I shall take up the last objection first. It is admitted by the applicant for the purposes of this application that a declaration was filed by him in the court of the District Magistrate with his application for transfer. It is, however, argued that the declaration was not one which the District Magistrate was bound or authorized by law to receive in evidence and to act upon it, and indeed he did not consider it evidence, for he examined some witness on the basis of whose statements an order of transfer was made. Therefore, if the declaration in question contained any false statement, no offence under section 199 of the Indian Penal Code has been committed. In support of this contention the following cases have been cited:—(1) *In the matter of the petition of Iswar Chunder Guho and others* (1), *Abdul Majid v. Krishna Lal Nag* (2), *Chandi Pershad v. Abdur Rahman* (3). I think that the contention for the applicant must prevail. A declaration, before it can be made the foundation of a prosecution under section 199 of the Indian Penal Code, must be one which is admissible in evidence, and which the court

(1887) I. L. R., 14 Calo., 653.

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which it is filed is bound or authorized by law to receive in evidence. The suggestion that there is no prohibition against the admission of such declaration in evidence does not render it admissible for the declarant amenable to the provision of section 199 of Indian Penal Code. It is not pointed out for the opposite party that the declaration filed by Ram Prasad was one which under the Criminal Procedure Code, or any other law, the court before which proceedings were pending was bound or authorized to receive in evidence. I therefore hold that the sanction granted by the District Magistrate for the prosecution of the applicant under section 199 of Indian Penal Code, cannot be upheld. It is unnecessary to discuss the other objections taken on behalf of the applicant. I, therefore, set aside the order of the learned District Magistrate, dated the 30th July, 1912, as against Ram Prasad.

Application allowed.

Before Mr. Justice Muhammad Rafiq.

GIGA v. MUHAMMAD AMIN*

Act No. XIII of 1859 (*Workman's Breach of Contract Act*)—*Procedure—Special procedure under the Act not applicable to ordinary loans between master and workman.*

I held that the special procedure provided by Act No. XIII of 1859 for the recovery of money advanced in the circumstances therein described is not applicable where money is advanced to a workman, not for the purpose of assisting him to complete a specific piece of work, but as an ordinary loan to be repaid out of the workman's wages. In the matter of *Anusoori Sanyasi (1)* referred to, the applicant Giga, having employed one Muhammad Amin to work at his shop, lent Muhammad Amin some money under an agreement by which the loan was to be repaid out of Muhammad Amin's wages. Before, however, the loan was repaid, Muhammad Amin left the service of Giga. Giga thereupon filed a complaint against Muhammad Amin under Act No. XIII of 1859 in the court of the Cantonment Magistrate of Cawnpore. The Magistrate referred the matter in dispute to arbitration. The majority of the arbitrators filed an award decreeing the sum of Rs. 51-4 to Giga, and that sum was paid. Giga, however, applied in revision to the Criminal Revision Judge to set aside the order of the Cantonment Magistrate, failing there, made a further application to the High Court.

* Criminal Revision No. 732 of 1912 from an order of W. F. Kirton, Sessions Judge of Cawnpore, dated the 7th of September, 1912.

(1) (1904) I. L. R., 28 Mad., 37.

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Mr. *E. A. Howard* (for whom Babu *Satya Chandra Mukerji*),
for the applicant.

The Assistant Government Advocate (Mr. *R. Malcomson*) and
Mr. *W. K. Porter*, for the opposite party.

MUHAMMAD RAFIQ, J.—This is an application in revision by one Giga, praying that the order of the learned Cantonment Magistrate, dated the 23rd of July, 1912, be set aside. It appears that Giga had employed Muhammad Amin, the opposite party, to work at the shop of the former. Muhammad Amin took a loan from the applicant for which he gave an agreement. Before the loan had been paid off, Muhammad Amin left the service of Giga. The latter filed a complaint under Act XIII of 1859, in the court of the Cantonment Magistrate, for the recovery of the loan or for an order directing Muhammad Amin to return to work. The learned Magistrate referred the matter to arbitration. The majority of the arbitrators filed an award decreeing Rs. 51-4-0, to Giga, the applicant. That sum, I understand, has been paid. It is contended for the applicant that the learned Magistrate had no jurisdiction to delegate his powers under Act XIII of 1859, to arbitrators. I find that the objection taken by the applicant need not be considered as his application must fail on another ground. The loans that can be recovered under Act XIII of 1859 are the loans which are advanced by employers to their workmen for doing specific work. In the present case it is admitted that the money advanced to Muhammad Amin was not advanced for doing any particular work. Whatever work he was doing at the time that he took the loan had been finished and nothing of it remained to be done. Under these circumstances the applicant's petition to the learned Magistrate could not be entertained; see *In the matter of Annsoori Sanyasi* (1). The application fails and is rejected.

Application rejected.

(1) (1904) I. L. R., 28 Mad., 37.

APPELLATE CRIMINAL.

1912
October, 24.

Before Mr. Justice Sir George Knox and Mr. Justice Muhammad Rafiq.

EMPEROR v. BADRI PRASAD.*

Jurisdiction—Practice—Evidence in criminal case recorded by Assistant Sessions Judge—Judgement pronounced by Sessions Judge without re-hearing the evidence.

Where a Sessions Judge decided a case upon evidence taken, not before him, but before an Assistant Sessions Judge, it was held that the Sessions Judge's judgement was *ultra vires* and a fresh trial was ordered.

In this case the applicant Badri Prasad was committed to the Court of Session at Mainpuri on charges under sections 467 and 471 of the Indian Penal Code. The case was transferred to the Assistant Sessions Judge. The Assistant Sessions Judge recorded the evidence in the case; but did not proceed to judgement, on the ground that one of the issues in the case was at the same time awaiting decision under appeal in the court of the District Judge. After some interval the case was taken up by the Sessions Judge, who did not hear the evidence at all, but proceeded to judgement upon the evidence recorded by the Assistant Sessions Judge, and convicted the accused. Badri Prasad thereupon appealed to the High Court, contending, *inter alia*, that the judgement of the Sessions Judge was in the circumstances passed without jurisdiction.

Babu Satya Chandra Mukerji, for the appellant.

The Assistant Government Advocate (Mr. R. Malcomson), for the Crown.

KNOX and MUHAMMAD RAFIQ, J.J.:—Badri Prasad has been convicted of an offence under section 471 of the Indian Penal Code and sentenced to a term of rigorous imprisonment and payment of a fine. He has appealed. We do not go into the facts of the case in view of the order which we propose to make. There has been unfortunately in the trial an irregularity which compels us to set it aside and to order a new trial. Badri Prasad was committed to the court of sessions at Mainpuri. The case was transferred by the court of sessions to the court of an Assistant Sessions Judge. The Assistant Sessions Judge heard the case so far as the evidence

* Criminal Appeal No. 440 of 1912 from an order of E. C. Allen, Sessions Judge of Mainpuri, dated the 23rd of May, 1912.

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PRASAD.

was concerned; but did not proceed to judgement, on the ground that one of the issues in the case was at the same time awaiting decision under appeal in the court of the District Judge, and we are told that the case remained pending for a year, when it was taken by the Court of Sessions at Mainpuri sitting at Etawah. The learned Sessions Judge did not hear the evidence at all, but proceeded to judgement upon the evidence recorded by the Assistant Sessions Judge. He had no jurisdiction to do this. The judgement and sentence are a judgement and sentence passed without jurisdiction and must be set aside. We notice what is apparently a mistake of law into which the learned Sessions Judge has fallen. He says that it is settled law that in such a case the accused cannot be convicted at one and the same time of forging a document and using that document as forged and the charges under sections 467 and 471 must, therefore, be regarded as alternative. We know of no authority to this effect and none has been pointed out to us.* It must be distinctly understood that we pronounce no opinion whatever upon the evidence relating to either of these charges. Moreover, we wish to point out that it is most inexpedient for a sessions trial to be adjourned. The intention of the Code is that a trial before a court of sessions should proceed and be dealt with continuously from its inception to its finish. Occasions may arise when it is necessary to grant adjournments, but such adjournments should be granted only on the strongest possible ground and for the shortest possible period. With these remarks we allow the appeal so far that we set aside the conviction and sentence and send back the case for trial before the Court of Sessions at Fatehgarh.

Record returned.

* [But see *Queen-Empress v. Umrao Lal*, I. L. R., 23 All, 84. Ed.]

APPELLATE CIVIL.

1912
October, 28.*Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.*

MUNSHI LAL AND ANOTHER (JUDGEMENT-DEBTORS) V. RAM NARAIN (AUCTION PURCHASER).*

Civil Procedure Code, 1908, order XXI, rules 84, 89, 92—Execution of decree—Sale of immovable property—Acceptance of final bid deferred—Application to set aside sale—Limitation.

Held that a sale of immovable property in execution of a decree is not complete until the sale officer has accepted the final bid and the purchaser has paid in the deposit of 25 per cent. of the purchase money required by rule 84 of order XXI of the Code of Civil Procedure, 1908. The period of thirty days prescribed by rule 92 will not, therefore, begin to run against a person applying under rule 89 if for any reason the final bid remains for a time unaccepted by the sale officer.

The facts of this case are fully stated in the judgement of the Court.

Mr. M. L. Agarwala, for the appellants.

Babu Jogindro Nath Chaudhri and Babu Sarat Chandra Chaudhri, for the respondent.

TUDBALL and MUHAMMAD RAFIQ, J.J. :—The circumstances out of which the present appeal has arisen are as follows :—Certain property was put up for sale in execution of two decrees, one of which was for Rs. 11,521 and the other was for Rs. 2,521. Apparently, when the decrees were sent to the Collector for execution, there was an error in the *rubkar* sent and Rs. 1,521 was shown as the amount due under the one decree instead of Rs. 11,521. The property was duly notified for sale, and on the 22nd of August it was put up for sale. Ram Narain was the highest bidder and offered Rs. 6,400. The sale officer, as his order of the 22nd of August shows, seeing that the total amount apparently due under the decrees was Rs. 3,673, was of opinion that it was unnecessary to sell the whole of this property, and made up his mind to sell it in two lots of one-half each. It is equally clear from his order of the same date that the decree-holder at once informed him that the amount due under the one decree was Rs. 11,521 and not Rs. 1,521. The sale officer made up his mind to verify this statement from the civil court, and in his order of the 22nd of August, he distinctly states that he does not conclude the sale—“*ekhtetam-i-nilam manzur nahin kia ja sakta*”—and he postponed the matter till he received

* First Appeal No. 47 of 1912 from an order of Muhammad Husain, First Additional Subordinate Judge of Meerut, dated the 20th of January, 1912.

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information. On the 28th of August he received information that the correct amount due under the decree was. Rs. 11,521. He accordingly noted this in his order, which distinctly states that he concludes the sale as it is unnecessary to sell the property afresh in two lots. On that same date he received from Ram Narain the one-fourth deposit which it is necessary to make under order XXI, rule 84, of the Code of Civil Procedure. On the 23rd of September, on an *ex parte* application, the civil court confirmed the sale. From the 24th of September till the 26th of October the court closed for vacation. On the 26th of October the judgement-debtor deposited the amount of the decree *plus* 5 per cent. of the purchase money as required under order XXI, rule 89, and he asked that the sale should be set aside. The learned Subordinate Judge refused to set aside the sale, being of opinion that it was impossible for him to do so after he had once confirmed the sale. The judgement-debtor comes here in appeal, and it is urged, we must admit, with considerable force that the auction sale was not concluded until the 28th of August; that the deposit made on the 26th of October was a deposit made within time, i.e., within thirty days of the sale, omitting the vacation, and that the learned Subordinate Judge was not debarred from setting aside the sale merely because he had, on the 23rd of September, by an *ex parte* order, confirmed it. It is contended on behalf of the respondent that the sale in the present instance took place on the 22nd of August, and that if the judgement-debtor wished to make a deposit, he was bound to do so before the 22nd of September. In our opinion, in view of what took place on the 22nd of August and the lengthy order passed by the sale officer on that date, and the action that he took in the meantime, and his order of the 28th of August, it is quite clear that the sale was not concluded until August the 28th. We cannot accept the contention that directly a bid is made the sale is concluded. In his order of 22nd August the sale officer distinctly and in very clear language stated that he did not conclude the sale; that the final bid was not there, and that it was his intention to split up the property into lots and put up the same afresh. Under order XXI, rule 84, a person who is declared to be the purchaser at a sale has immediately after such declaration to make a deposit of 25 per cent. on the amount of his purchase money to the officer conducting the sale. It is, therefore,

1912.
November, 11.

Before Mr. Justice Sir Harry Griffin and Mr. Justice Chamier.

MASIH-UD-DIN (PLAINTIFF) v. BALLABH DAS AND OTHERS (DEFENDANTS).*

Muhammadian law—Waqf—Subsequent failure of title of waqf—Right of mutawalli to sue on indemnity bond executed in favour of waqf as purchaser—Right of plaintiff to shift basis of claim during suit—Practice.

A. purchased a village, the vendors giving him an indemnity bond in case he should be dispossessed. A. then made a waqf of the property purchased, naming himself as mutawalli and after him his son M. A. lost the property as the result of a suit, and subsequently (A meanwhile having died) M. sued as mutawalli to enforce the terms of the indemnity bond. *Held* that the waqf was invalid, and that M. could not be permitted to change the character of the suit by claiming as one of the heirs of A.

*Per CHAMIER, J:—*Even if the waqf was valid, the mutawalli was not entitled to maintain the suit in the absence of a transfer to him as such of the vendee's rights under the indemnity bond.

The facts of this case were as follows:—

By a sale deed, dated the 12th of November, 1889, Seth Kishan Chand and Gokul Chand sold the village Lasra to Shaikh Abdullah, and on the same date they executed an indemnity bond to the effect that in case the village sold went out of the hands of the vendee for want of a clear title in the vendors, the former would pay back the price together with damages to the latter, and as a security for the due performance of that agreement mortgaged certain villages to Abdullah. On the 22nd of May, 1897, Abdullah made a waqf of the village Lasra and himself became a mutawalli. On his death his son, the plaintiff in this case, became mutawalli. There was some litigation with respect to Lasra, with the result that for want of title in the vendors it went out of the hands of the plaintiff (under a decree of the High Court) on the 11th of May, 1906. He was held also liable to pay mesne profits and costs. The plaintiff, therefore, sued to enforce the indemnity bond. The defendants pleaded, *inter alia*, that the plaintiff as mutawalli was not entitled to sue as the mortgagee inasmuch as the rights arising under the indemnity bond were not included in the waqf. It was further pleaded that Abdullah having acquired no clear title in the village Lasra, could not make a valid waqf of that property and the indemnity bond was without consideration. The Subordinate Judge dismissed the suit, holding that the sale was *void ab initio*; that there was no

* First Appeal No 214 of 1911 from a decree of Achal Behari, Subordinate Judge of Banda, dated the 29th of March, 1911.

valid waqf; that the waqf that did not include the indemnity bond and that there was no separate legal consideration for the bond. The plaintiff appealed to the High Court.

Babu *Jogindro Nath Chaudhri* (with him *Maulvi Rahmatullah*), for the appellant, contended that *Abdullah*, when he became a mutawalli, could himself enforce his rights under the indemnity bond. He had in him vested all the rights arising out of that bond. In this case it could not be said that those rights did not pass to the plaintiff. He cited the Transfer of Property Act, section 55(2). The subject-matter of the waqf must belong to the owner of the property and in this case it did belong to him under the sale deed. These rights would pass because there was a clear intention that they should. The reservation of such a right would clearly be inconsistent with the intention of the waqf. The extinction of his own rights was absolute. The waqf attached to the money. It was for the benefit of the waqf that the suit had been brought. The second position of the appellant was that if he could not enforce the indemnity bond as a mutawalli, he should be permitted to enforce it as one of the heirs of *Abdullah* as a personal claim.

The Hon'ble Dr. *Sundar Lal*, The Hon'ble Pandit *Moti Lal Nehru*, Babu *Durgu Charan Banerji* and Pandit *Uma Shankar Bajpai*, for the respondents, were not called upon.

GRIFFIN, J:—This appeal arises out of a suit to enforce a claim under an indemnity bond executed in favour of one *Abdullah* by *Kishan Chand* and *Gokul Chand* on the 12th of November, 1889. On that date *Kishan Chand* and *Gokul Chand* executed a sale deed of a village named *Lasra*, in favour of *Abdullah*. The latter apparently had some doubts as to the validity of his vendors' title, for, on the same date, he took from his vendors an indemnity bond the conditions of which have given rise to the present suit. By this indemnity bond the vendors undertook to make good to *Abdullah* the sale price together with any loss he might sustain on account of any defect of title in the property conveyed by the sale deed. Apparently, *Abdullah* entered into possession of the property sold and remained in possession until the 27th of May, 1897, when he made a dedication of this village along with others for certain religious purposes. Under the waqfnamah he appointed himself the first mutawalli

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Griffin J.

and nominated his son, the appellant before us, his successor. In the life-time of Abdullah, Musammat Naraini appeared as a claimant of the ownership of the village Lasra. She was the adoptive mother of one Ram Gopal, a nephew of Abdullah's vendors. Her suit was decreed by this Court on the 21st of December, 1905, and Musammat Naraini obtained possession of the village Lasra in May, 1906. This suit was instituted on the 3rd of August, 1910, to recover a sum of Rs. 52,000 on account of the price of the village, Lasra, and the loss incurred by the plaintiff owing to the village having passed out of his possession. The defendants 1 to 5 are transferees from the vendors of Abdullah of the village hypothecated under the indemnity bond mentioned above. Musammat Naraini, the sixth defendant, is the person who, under a decree of this Court, obtained possession of the village Lasra. The defendants 7, 8 and 9 are representatives of the vendors. They have not appeared to defend the suit, and no relief was asked as against them. Abdullah died during the pendency of the appeal in this Court in the suit brought by Musammat Naraini, and his son, who is the appellant here, was brought on the record as his representative. The present suit was defended on various grounds, and we are concerned here with two only. The lower Court has upheld the contention of the defendants; first, that the waqf is invalid and, therefore, the plaintiff is not entitled to maintain the suit, and secondly, that Abdullah, the vendee, at the time he created the waqf, did not at the same time convey to the mutawalli his rights under the indemnity bond. In appeal, it is contended that the court below was wrong in holding that the waqf was invalid and that the plaintiff has no right to maintain the suit because the waqfnamah contained no mention of a conveyance to the mutawalli of the vendee's rights under the indemnity bond. It is, further, contended that if the present suit cannot be maintained by reason of any defect in the plaintiff's position as mutawalli, he ought to be allowed to continue the suit as heir of the vendee, Abdullah. This Court in its decision of the 21st December, 1905, held that the sale to Shaikh Abdullah was not a valid sale and that Abdullah was not a *bona fide* purchaser under that sale. The Muhammadan law on the

subject of waqf, which it is necessary to refer to in this case, will be found at page 134 of Ameer Ali's Muhammadan Law, Volume I:—"The subject-matter of the dedication must be the property of the waqf at the time the waqf is made, that is, he must be in a position to exercise dominion over it. Consequently, if a waqf is made by a person of some property of which he is in unlawful possession, but which he, subsequently purchases from the rightful owner, such waqf is invalid. So also, when a man makes a waqf for certain good purposes of land belonging to another, and then becomes the proprietor of it, the waqf is not lawful, but it would become validly dedicated if ratified by the proprietor. Accordingly, when a person purports to make a waqf of property which does not belong to him, and such waqf is subsequently ratified by the true owner, the dedication is valid." Here, it will be seen that Abdullah made a dedication of certain property of which he was not the true owner. There has been no ratification of the waqf by the true owner, and I am not satisfied that, according to the Muhammadan law as set out above, the so-called waqf, so far as the particular village Lasra was concerned, was valid. I agree, therefore, with the lower court in dismissing the plaintiff's suit on that ground. I do not consider it necessary to go into the second ground as to what was the exact intention of Abdullah in regard to his rights under the indemnity bond at the time he executed the waqfnamah. As to the plea advanced on behalf of the appellant that he should be permitted to continue the suit in his capacity as heir of the deceased, Abdullah, I do not think that the request is one which should be acceded to at this stage of the case. It is not pretended that the plaintiff is the one and only heir of Abdullah, and I am not prepared at this stage of the case to allow the plaintiff to continue the suit in an entirely different capacity. In my opinion the suit was rightly dismissed by the court below, and I dismiss this appeal with costs.

CHAMIER, J:—I agree that the appeal should be dismissed, but I should prefer to rest the dismissal of the appeal on the ground that even if the waqf was valid, the plaintiff has no right to sue on the deed of indemnity as mutawalli of the waqf.

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The right to sue on that deed does not appear to have been transferred to the mutawalli for the time being. Under the waqfnamah Abdullah abandoned his title to mauza Lasra, but did not mention or in any way refer to the deed of indemnity. The right to sue on that deed is not appurtenant to the interest of Abdullah in mauza Lasra and did not pass to the mutawalli for the time being under section 8 of the Transfer of Property Act or under any other provision of which I am aware. If it was intended that the mutawalli for the time being should have the right to sue on the deed of indemnity, I can only say that, in my opinion, no such intention has been expressed in the waqfnamah. I agree that the plaintiff should not, at this stage, be allowed to convert the suit by him as mutawalli into a suit by him as one of the heirs of Abdullah.

By THE COURT:—The appeal is dismissed with costs so far as defendants 1 to 5 are concerned.

Appeal dismissed.

1912
November, 15.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Banerji.

KARTA KISHAN, (PLAINTIFF) v. HARNAM CHAND, (DEFENDANT) *
Act No. XVI of 1908 (Indian Registration Act), section 32—"Presentation"—Presentation by a servant of the mortgagor in the presence of mortgagor.

Where a mortgage-deed was handed over to the sub-registrar for the purpose of registration by a person other than the mortgagor, but the mortgagor was present assenting to the registration of the document with full knowledge of what was being done in the office of the sub-registrar: *held* that the presentation was a valid presentation within the meaning of section 32 of the Registration Act. *Nath Mal v. Abdul Wahid Khan* (1) followed. *Mujib-un-nissa v. Abdur Rahim* (2) distinguished. *Jambu Prasad v. Aftab Ali Khan* (3) not followed.

This was a plaintiff's appeal in a suit for sale upon a mortgage. Both the courts below dismissed the suit upon the ground that the registration of the document was defective, and the sole question in appeal before the High Court was whether in the circumstances the mortgage-deed was validly registered. The circumstances in which registration was effected are detailed in the judgement of the Court.

*Second Appeal No. 51 of 1912 from a decree of W. D. Burkitt, District Judge of Saharanpur, dated the 19th of July, 1912, confirming a decree of Muhammad Shafi, Subordinate Judge of Saharanpur, dated the 26th of September, 1911.

(1) (1912) I. L. R., 34 All., 355.

(2) (1901) I. L. R., 23 All., 233.

(3) (1912) I. L. R., 34 All., 331.

Mr. *Nihal Chand* (with him *Babu Jogindra Nath Chaudhri* and Mr. *A. P. Dube*), for the appellant—

Mr. *B. E. O'Connor*, for the respondent.

RICHARDS, C. J. and BANERJI, J.:—The only question which has been argued in this appeal is whether or not the mortgage sued upon was duly presented and registered in accordance with the provisions of the Indian Registration Act. The document was in fact registered. It has an endorsement that it was “presented” for registration in the office of the sub-registrar. Below this is the name of a person which is variously read as *Santh*, *Natha*, or *Sehua*. He is described as the servant of the mortgagee. The mortgagor in answer to the interrogatories served upon him admits that he was present when the document was being registered and when it was handed over to the sub-registrar. He cannot remember apparently who actually handed over the document, but he says that some person whose name, probably, was *Santha*, handed over the document. It is clear, however, from the admitted facts in the case that at the time of registration the mortgagor was present assenting to the registration of the document, with full knowledge of what was being done in the office of the sub-registrar. The real question for consideration is whether or not these circumstances amount to a “presentation” within the meaning of section 32 of the Indian Registration Act. Both the courts below have dismissed the plaintiff’s suit on the preliminary point that the mortgage was not duly “presented” for registration. There has been some conflict of authority on this question and the point was very fully argued recently before a Full Bench of the Court, but unfortunately no decision was pronounced by the Court on the question now before us, the case turning on another point. In the case of *Nath Mal v. Abdul Wahid Khan* (1), a case in which the facts were very similar to those of the present case, it was decided that where a person who was authorized to “present” a document for registration was present assenting to the registration, the mere fact that his was not the hand to give the document to the sub-registrar did not prevent the document being regarded as duly “presented” within the meaning of the section. No doubt a somewhat contrary view was taken in the case of *Jambu Prasad v. Aftab Ali Khan* (2). We think under all the circumstances

(1) (1912) I. L. R., 4 All., 355. I. L. B., 34 All., 331.

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we are entitled to consider the question on its merits without feeling bound by authority, particularly as we have had so recently the benefit of the very full arguments advanced in the Full Bench case to which we have referred.

The Privy Council decision in the case of *Mujib-un-nissa v. Abdur Rahim* (1) has in our opinion no application to the circumstances of the present case. In that case the person who presented the document had been the attorney of a deceased person who wished to execute and register a deed of waqf. Before the document was presented for registration the donor of the power of attorney had died. Consequently the person presenting the document for registration had no authority from any one to present the document, nor was there any other person present who could have legally "presented" the document for registration. We think that the remarks of their Lordships in this case must be read and understood in connection with the facts of the case which were before them. After full consideration we see no reason to depart from the view which we expressed in the case of *Nath Mal v. Abdul Wahid Khan* (2). We, accordingly, allow the appeal, set aside the decree of both the courts below and remand the case to the court of first instance, through the lower appellate court, with directions to readmit the case upon its original number in the file, and proceed to hear and determine the same according to law. Costs here and heretofore will be costs in the cause.

Appeal allowed.

1912
November, 19.

Before Mr. Justice Sir Harry Griffin and Mr. Justice Chamier.

ALLAH DAD KHAN AND OTHERS (DEFENDANTS) v. SANT RAM (PLAINTIFF) AND WAHID-UN-NISSA AND OTHERS (DEFENDANTS)*.

Act No. VII of 1889 (Succession Certificate Act), sections 4 and 16—Succession certificate—Holder of certificate not entitled to assign his rights thereunder.

Held that the rights conferred by the grant of a succession certificate under Succession Certificate Act, 1889, are personal to the grantee and cannot be assigned.

The facts of this case are as follows :—

One Bahadur Khan was a mortgagee. He died, leaving Farzand Ali and others as his heirs. Farzand Ali on the 25th of

*First Appeal No. 43 of 1912 from a decree of Pitambar Joshi, Second Additional Judge of Moradabad, dated the 18th of March, 1911.

(1) (1901) I. L. R., 29 All., 233.

(2) (1912) I. L. R., 34 All., 355.

August, 1900, obtained a certificate under the Succession Certificate Act for the collection of the mortgage debt due to Bahadur Khan. On the 15th of March, 1904, Farzand Ali assigned the mortgage debt to Sahu Sant Ram together with his right to sue for the same, and made over to the assignee the succession certificate which he had obtained. The assignee brought a suit, on the strength of that assignment, for enforcement of the mortgage. He did not produce any succession certificate empowering him to collect the debt due to Bahadur Khan, but produced the one which was granted to Farzand Ali. The defence, *inter alia*, was that the certificate granted to Farzand Ali could not be acted upon by his assignee. This objection was overruled and the suit decreed. The defendants appealed.

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The Hon'ble Pandit *Moti Lal Nehru* (with him The Hon'ble *Nawab Muhammad Abdul Mujid*), for the appellants :—

The plaintiff cannot get a decree except on the production of a succession certificate granted to himself. Section 4 of the Succession Certificate Act is imperative. It has been definitely ruled that the section applies to mortgage debts as well as to simple money debts. The law does not recognize an assignment of a succession certificate; the right granted by such a certificate is a purely personal one, confined to the grantee thereof. To recognize such assignments would be to defeat the object of the Succession Certificate Act, which is to protect the debtor against the worry and uncertainty arising from disputes relating to the claimant's title. Section 16 of the Act indemnifies payments only when they are made to the person to whom the certificate has been granted. The plaintiff, by obtaining an assignment from the certificate-holder of his right to sue, cannot be deemed to have fulfilled the requirements of section 4.

Mr. B. E. O'Connor (for *Maulvi Muhammad Ishag*), for the respondents :—

The requirements of section 4 have been complied with, inasmuch as a succession certificate covering the debt sued for has been produced. The section does not expressly require that the certificate should have been granted to the plaintiff personally, though in the case of a probate or letters of administration there is a distinct provision that the latter should have been granted to the plaintiff. The omission from clause (iii) of the words "to him"

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which occur in clause (i) is significant. There is nothing to prohibit the assignment of the rights under a succession certificate together with an assignment of the debt itself. The recognition of such an assignment would not go against the objects of the Succession Certificate Act. The fiscal object would in no way suffer, as a certificate, in the first instance, would still be necessary. And where the debt together with the right of collection thereof granted by a succession certificate are assigned, there arises no question of involving the debtor in vexatious disputes relating to the title of rival claimants. In this case the assignee is substituted for the original grantee of the certificate and the protection against the demands of rival claimants remains unaffected. None of the objects of the Act is, therefore, frustrated. Should a fresh certificate be deemed necessary the plaintiff may now be given an opportunity of obtaining and producing it.

The Hon'ble Pandit *Moti Lal Nehru* replied.

GRIFFIN and CHAMIER, J.J.:—This was a suit upon a mortgage made in favour of one Bahadur Khan by two persons who are now represented by the appellants and others. Bahadur Khan died leaving a son, Farzand Ali, and other heirs. Farzand Ali applied for a succession certificate in respect of several debts due to his father. Some of the other heirs stated that they had relinquished their rights in his favour, and a certificate was issued to Farzand Ali, who some years later assigned the mortgage debt together with his right to sue for the same to the respondent, Sant Ram. It is, on the strength of that assignment, that the present suit was brought. The claim was resisted upon several grounds, one of which was that Farzand Ali was not competent to transfer to another the right conferred upon him by the succession certificate to sue for the recovery of the debt. The court below decided this and other questions against the appellants. Hence this appeal.

Apart from the provisions of the Succession Certificate Act, Farzand Ali, as one of the heirs of Bahadur Khan, could have sued upon the mortgage, making as defendants the heirs of Bahadur Khan, who declined to join as plaintiffs. He could also have assigned his interest in the mortgage to the respondent, Sant Ram. Indeed, the assignment in favour of Sant Ram may be regarded

as having transferred to Sant Ram all Farzand Ali's rights under the mortgage, although the assignment purports to have been made by Farzand Ali as holder of the succession certificate. But section 4 of the Succession Certificate Act provides that no court shall pass a decree against a debtor of a deceased person for payment of his debt to a person claiming to be entitled to the effects of a deceased person or to any part thereof, except upon the production by the person so claiming of a certificate granted under that Act or of one or other of certain other documents, which admittedly have not been produced in this case. It has been held by this Court in many cases, which we are bound to follow, that a debt secured by a simple mortgage is a debt within the meaning of the provision just quoted. A certificate under the Succession Certificate Act has been produced, but it is in favour of Farzand Ali. The question is whether such a certificate is sufficient. The Act does not in so many words say that the certificate must be one in favour of the plaintiff, but we think that that is the meaning of the provision. The declared object of the Act is to facilitate the collection of debts on successions and to afford protection to parties paying debts to the representatives of deceased persons. Section 16 of the Act protects a debtor of a deceased person who pays the debt in good faith to the *person to whom the certificate was granted*. An assignee of the person to whom the certificate was granted does not appear to come within the section. From this it would appear that the person to sue for the debt is the person to whom the certificate was granted. Notwithstanding the preamble to the Act, one of the objects of the Act seems to have been to prevent people from evading payment of the duty payable on certificates issued under Act XXVII of 1860. If that had been the sole object of the Legislature, there would have been much to say for the view taken by the court below. But the main object must be taken to be that stated in the preamble. The Act is designed to enable debtors to know with certainty the person to whom they can safely pay a debt due to a deceased person. If we were to hold that any person may sue for the recovery of a debt due to a deceased person provided that he produces a certificate having the debt specified in it, the debtor would have to trace the title of the plaintiff and

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we should re-introduce the confusion which the Act was designed to remove. If the plaintiff relies upon a grant of probate or letters of administration, he must show that the grant was made to him, and we see no reason why it should be otherwise in the case of a succession certificate. The result is that the plaintiff, in our opinion, was not entitled to maintain this suit.

It was suggested that we might adjourn the case in order that the plaintiff might apply for a certificate. We cannot allow this, as the plaintiff cannot be permitted to convert a suit by him as assignee of Farzand Ali into a suit by him as holder of a certificate authorizing him to collect debts due to Bahadur Khan. The appeal is allowed and the suit is dismissed with costs.

Appeal allowed.

REVISIONAL CRIMINAL.

Before Mr. Justice Tudball.

ANGAN AND OTHERS v. RAM PIRBHAN.*

Criminal Procedure Code, sections 203, 437—Complaint summarily rejected—

Further inquiry.—Notice to person complained against not necessary.

A notice to a person against whom a complaint is made is quite unnecessary where it is sought to set aside the summary order rejecting the complaint in a proceeding to which he was actually no party.

A complaint made against Angan and others was summarily rejected by a magistrate of the first class without calling upon persons complained against. Subsequently a fresh inquiry into the subject matter of the complaint was ordered by the District Magistrate, again without notice to Angan and others. Angan and others applied to the High Court for revision of this order upon the ground that it could not have been legally passed without notice to them.

Mr. R. K. Sorabji, for the applicants:—

It is a well-established principle of criminal law that no order should be passed to the prejudice of any party by a court exercising appellate or revisional powers without giving that party an opportunity of showing cause against the passing of such order. Although section 437 of the Criminal Procedure Code does not expressly provide for the giving of such an opportunity, yet precedents have

*Criminal Revision No. 822 of 1912 from an order of E. M. Nanavatty, District Magistrate of Budaun, dated the 21st of September, 1912.

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laid down the rule that it should be given. I rely on the case of *Queen-Empress v. Ajudhia* (1) and on the cases cited therein. It is true that those were cases where the accused person was discharged, and not cases where the complaint was dismissed forthwith under section 203, without making the accused person a party, but as regards the advisability or desirability of giving notice to the party affected there is no difference in principle between the two cases.

[TUDBALL, J., referred to *Mir Ahwad Hossein v. Mahomed Askari* (2) and *Queen-Empress v. Puran* (3)].

Mr. G. W. Dillon, for the opposite party, was not called upon.

TUDBALL, J.—One Ram Pirbhan *alias* Ram Parpan filed a complaint in the court of a first class magistrate against the present applicants, preferring a charge of defamation against them. The petitioner's complaint was dated the 21st August, 1912, but was filed in court on the 22nd of August. The Magistrate recorded the complainant's statement on oath and forthwith dismissed the complaint. The complainant at once went to the District Magistrate in revision and the latter ordered a further inquiry. The applicants come to this Court in revision against that order and the main contention is that the order was passed behind their back and without notice to them and is therefore bad in law. In my opinion there is no substance in the contention for the simple reason that there has been no order of discharge whatsoever. They at no time had been called upon to appear and defend. The Magistrate has simply dismissed the complaint without any inquiry whatsoever. Under rulings of this Court it would have been open to the same magistrate to accept a fresh complaint by the complainant on the same facts and to have taken action thereon and to have made an inquiry. To the same effect is the decision of a Full Bench of the Calcutta High Court. In my opinion a notice to a person against whom a complaint is made is quite unnecessary where it is sought to set aside the summary order in a proceeding to which he was actually no party. In the present instance the complaint was dismissed without inquiry and at the very least the complainant was entitled to an inquiry even though only under section 202, Criminal Procedure Code. It was open to the court to make

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an inquiry under section 202 of the Code or after issue of summons to the accused person. My attention has been called to certain rulings of this Court, e.g. *Queen Empress v. Ajudhia* (1), but an examination of these rulings shows that they were all cases in which the accused was tried and discharged and a further inquiry was ordered behind his back and without notice issued to him. The present is not a case in which it was necessary to issue notice to the accused persons before ordering further inquiry. I therefore reject the application. The proceedings which have been stayed will be continued.

Application rejected.

(1) (1893) I.L.R., 20 All., 339.

He also claimed mesne profits on the ground of exclusion from the joint family, as he had not since 1901 received any share of the profits of the joint property. *Held* that although he had not received any of the profits of the joint estate, the evidence was clear that the appellant was offered an allowance from the profits of the joint property which he refused to accept as being inadequate, and that would not amount to exclusion.

APPEAL from a decree (30th October, 1909) of the Court of the Judicial Commissioner of Oudh which varied a decree (27th August, 1908) of the Additional Judge of Hardoi.

The only question for determination on this appeal was whether the appellants were entitled to a decree for mesne profits against the respondents, in addition to the decree for partition of their joint properties.

The facts are for the purpose of this report sufficiently stated in the judgement of their Lordships of the Judicial Committee.

The appellant Suraj Narain, with his two sons as co-plaintiffs, instituted the suit which gave rise to this appeal, against Bakht Narain and his family (defendants nos. 1 to 6) and also against Ratan Lal, Madan Mohan Lal, and Kishan Lal (defendants nos. 7 to 9). He claimed that the properties in the names of the defendants nos. 7 to 9 belonged to the joint family, alleging that they had wrongly taken possession of them in collusion with Bakht Narain. He alleged that he had totally separated himself from Bakht Narain at the end of October, 1901, and that there had been a "legal partition" of the properties, first made in November, 1900, and completed in October, 1901, and he prayed for possession of his half share of the joint family properties, for mesne profits, and other relief.

The defence was a denial of the separation and partition alleged, and also of the right of the plaintiffs to mesne profits.

The only issue now material was the 16th, which was as follows :—Can the plaintiffs claim accounts and mesne profits from the defendants nos. 1 to 5, and what is the amount of the latter?

The Additional Judge of Hardoi held that Suraj Narain had separated from the family as alleged by him; that since his separation he had been excluded from the joint family property, and that he was consequently entitled to the mesne profits of his half share. He accordingly made a decree for possession of one-half share in the joint property with mesne profits.

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On appeal the court of the Judicial Commissioner, Mr. L. G. EVANS, Judicial Commissioner, and Mr. T. C. PIGGOTT, 2nd Additional Judicial Commissioner, after discussing the evidence at considerable length, came to the conclusion that neither separation nor exclusion had been proved, and that the claim for mesne profits was consequently not sustainable. In the result a decree for an account was made.

On the main point in the case, the proof of separation, the judgement of the Judicial Commissioner's court (which was delivered by Mr. PIGGOTT and concurred in by Mr. EVANS, after referring to the cases which had been cited in argument, continued:—

"Mr. Justice Markby was decidedly of opinion that it followed from the principles laid down by their Lordships of the Privy Council in *Appovier's case* that one member of a joint family might turn his joint ownership of the family property into a tenancy in common within the meaning of that ruling by merely signifying to the other members of the family an intention to that effect. We have not been referred to any Privy Council case which goes so far as this; and it seems to me that the principle thus broadly stated cannot be affirmed without serious qualification. It would surely not be contended that, if one of two brothers who had up to that moment lived together as members of joint family were to say to another, at the end of some quarrel over family matters, 'Very well then, if you insist on treating me so badly, I intend to separate from you from this moment. You do not deny that my share in the family property is equal to yours, and I intend from henceforth to regard myself as the separate owner of my own half share,' such words would in themselves, and apart from any evidence of the subsequent conduct of the two brothers, have the effect of producing separation between them in law. The court would require at the very least to be satisfied that the subsequent conduct of the brother who had thus spoken was such as to put it beyond question that his words were not merely spoken in the heat of the moment, or intended as a threat to put pressure upon his brother and compel the latter to show more respect to his wishes, but embodied his deliberate purpose, consistently adhered to and evidenced by his subsequent actions. Moreover, there would have to be no room for doubt in the mind of the court that the parties concerned were entirely agreed as to the share in the family property each of them would have to take in the event of a separation. Personally I am not sure that even these qualifications are sufficient; or perhaps I might express my point more correctly by saying that I should require clear evidence of subsequent action on the part of the brother who had expressed his intention to separate with a view to acquiring, with as little delay as was reasonably possible under the circumstances, the separate control and enjoyment of the share claimed by him in the family property after separation. In the absence of such action on his part, I hold that a strong presumption would arise in favour of his having reconsidered the intention expressed by him in the heat of the moment and acquiesced in the continuance of the family in a

state of jointness. Applying these principles to the facts of the present case, it does not seem to me that anything like a sufficient case is made out in favour of the proposition that Pandit Suraj Narain on behalf of himself and his minor sons separated from Pandit Bakht Narain and his branch of the family, either in the month of March, 1901, or at any subsequent date prior to the institution of Pandit Suraj Narain's suit on June 20th, 1905."

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On the other branch of the plaintiff's case, namely, that Suraj Narain was in any event entitled to mesne profits as a member of a joint family who had been for years before the institution of the suit excluded from all participation in the joint family property, the appellate court said:—

"It must be remembered that we are dealing in this case with the members of a joint family who were often widely separated in residence, and who exercised their respective professions, or carried on various branches of business, without reference to any joint family account Under these circumstances the mere fact of non-participation by Suraj Narain in the profits of the joint family between the years 1901 and 1905 supposing such non-participation to be fully established, could scarcely be regarded as such evidence of exclusion as would justify a subsequent claim for mesne profits When Suraj Narain went away and took up employment in the Amethi estate without taking any further action, he seems to me, as I have already remarked, to have acquiesced in the existing state of affairs under which Bakht Narain remained in possession of the joint family property as manager, pending the settlement of outstanding accounts and disputes. Under these circumstances, I am of opinion that the claim for mesne profits cannot be brought and that the lower court was in error in passing a decree for the same."

The account directed was "an account of the income enjoyed by the defendants (and by Pandit Bakht Narain before his death) from the date of the institution of the plaintiff's suit on June 20th, 1905, to the date on which possession was given to the plaintiffs under the decree now appealed against, from the immovable property of the joint family in respect of which the plaintiffs have been found to be entitled to a half share. The defendants will be entitled to set off against such income, not only the expenses of management, but all expenditure which the court may find to have been properly incurred on objects to which the income of the joint family may properly be applied by the manager of the same. The balance, if any, will be treated as part of the divisible assets of the joint family, under the head of movable property, in the hands of the defendants, and the plaintiffs will be awarded the half of the same."

On this appeal—

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The decree of the court below
1912, December 10th:—The judgment of their Lordships
delivered by Mr. AMER ALI:—

The point for determination involved in this appeal turns the question whether the plaintiffs, who were admittedly members of a joint Hindu family governed by the Mitakshara law, separated, as they allege, in October, 1901, or whether they continued joint in property, if not in food and worship, as the defendants contend, up to the institution of the suit in 1905.

The parties are Kashmiri Brahmins settled in Oudh, and, with an exception of the defendant Ratan Lal, are descended from one Pandit Bishan Narain who died over 40 years ago. He left four sons, of whom Pandit Suraj Narain the first plaintiff is the only one now surviving. On Bishan Narain's death his eldest son Raj Narain became the *karta* of the joint family. On his death in 1890, Ram Narain, the next in order of seniority, assumed charge of the family estate. He died in October, 1900, leaving a daughter who is married to the defendant Ratan Lal. Her son Raj Indar Narain appears to have been adopted by Ram Narain, and although his name frequently appears in the course of the present litigation he is no party to the action. On the death of Ram Narain, the defendant Bakht Narain, who has died since the institution of this suit, applied in November, 1900, for mutation of names in the Collector's register in respect of the joint family property. On the 8th of December, 1900, Suraj Narain filed a petition objecting to the mutation being effected in Bakht Narain's name alone, and praying that his name along with the plaintiffs' and Raj Indar Narain's might be entered in equal shares

Some action appears to have been taken by the revenue authorities on the application of Bakht Narain, but before any definite order was made, the parties came to a settlement which was embodied in a deed of compromise. This document bears date the 27th February, 1901, and after reciting the facts connected with Suraj Narain's application, proceeds to state as follows:—
"Hence, in submitting this application we pray that mutation of names be effected in favour of Pandit Bakht Narain alone as the head of a joint family"

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and the status of the family has continued joint from the death of Pandit Ram Narain up to this day and shall remain so as long as any dispute does not arise among the heirs."

Bakhsh Narain's name was accordingly entered with regard to the entire joint estate, and matters apparently remained *in statu quo* for the next two years. In consequence of some quarrel with his elder brother, Suraj Narain, on the 5th of May, 1903, applied to the revenue authorities to have his and Raj Indar Narain's names entered jointly in respect of two-thirds of the family properties.

The differences between the brothers seem to have been mainly connected with the question of the shares the two branches of the family would take upon a partition. As Bakhsh Narain had three sons and Suraj Narain had only two, the latter evidently apprehended that if the division were to be made *per capita* his branch would obtain a smaller share. The compromise of February, 1901, which provided for a reference to the Advocate-General was really intended to remove this fear on the part of Suraj Narain.

On the 31st August, 1903, the Assistant Collector made an order in favour of Suraj Narain. This order was reversed on appeal by the Deputy Commissioner on the 30th of October, 1903. The Deputy Commissioner embodies in his judgment the actual contentions advanced before him by the parties, which afford a strong indication of the views they then took of the position of the family. Their Lordships will refer to this document when dealing with the arguments at the Bar on this appeal.

After the Deputy Commissioner's order, Suraj Narain returned to the service of the Amethi Estate and remained there up to the end of 1904. In June, 1905 he, in conjunction with his surviving son, brought the present suit against Bakhsh Narain and his sons for a partition of the family properties. The various proceedings in the suit of Bakhsh Narain against Ratan Lal, in which Suraj Narain attempted to be joined as a plaintiff, have no direct bearing on the question their Lordships have to consider.

In the present action, the plaintiffs, Suraj Narain and his son, claimed to recover *mesne profits* from Bakhsh Narain and his branch of the family, on the ground that they had separated from the joint family in October, 1901. Their contention was accepted by the Subordinate Judge, who made a decree in their favour on

that basis. The Judicial Commissioners have on appeal reversed his decision; and the present appeal to his Majesty in Council is from their judgement. The learned Judges have carefully and elaborately examined the evidence on the question of the alleged separation in October, 1901; and as their Lordships agree with the main conclusions of the court below, they do not consider it necessary to deal with the matter in detail.

The principle applicable to cases of separation from the joint undivided family has been clearly enunciated by this Board in *Rewun Persad v. Radha Beby* (1) and the well-known case of *Appovier v. Rama Subba Aiyar* (2). What may amount to a separation or what conduct on the part of some of the members may lead to disruption of the joint undivided family and convert a joint tenancy into a tenancy in common must depend on the facts of each case. A definite and unambiguous indication by one member of intention to separate himself and to enjoy his share in severally may amount to separation. But to have that effect the intention must be unequivocal and clearly expressed. In the present case that element appears to their Lordships to be wholly wanting. By the compromise of February the parties had agreed to retain the status of jointness which had existed till then "until any dispute arose among the heirs." Suraj Narain alleges that he separated a few months later; there is, however, no writing in support of his allegation, nothing to show that at that time he gave expression to an unambiguous intention on his part to cut himself off from the joint undivided family. The oral evidence on which the allegation has mainly rested, as the learned Judges in the court below point out, is either inconclusive or unreliable. On the other hand, his conduct, borne out by documents, is clearly against his contention. After the compromise of February, 1901, the mutation proceedings instituted by Balkht Narain in November, 1900, were continued, and on the 2nd of January, 1902, the revenue officer directed that the statements of the two brothers should be recorded "to ascertain in whose name the entry should be made." And on the 8th of February the officer in question made the following order:—

"As the statements of Pandit Balkht Narain and Suraj Narain have been received and they unanimously show their willingness for the entry of the name

(1) (1846) 4 Moo. T. A., 137.

(2) (1866) 11 Moo. T. A., 75.

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of Bakht Narain and declare his possession also, and as no one has filed any objection, it is therefore ordered that, after expunging the name of Ram Narain, deceased, the name of Bakht Narain be entered and the file be submitted to the officer in charge of pargana for sanction."

The conduct of Suraj Narain on this occasion was certainly not consistent with his allegation that he had severed his connection with the joint family, of which Bakht Narain was the acknowledged "head," in October, 1901.

In his application of the 5th May, 1903, among other matters, he speaks of a separation in "mess and worship," but there is no mention of a division of rights in property. Had his present statement been true, some reference would unquestionably have been made to it in this document. Separation from commensality, as was observed in the case of *Rezun Persad v. Radha Beeby* (1) does not as a necessary consequence effect a division of the joint undivided property. A separation in mess and worship may be due to various causes, and yet the family may continue joint in estate. In the present case there is evidence to show it arose from a difference in the religious opinions of the two brothers.

But the conduct of Suraj Narain after the order of the Deputy Commissioner on the 30th October, 1903, and the statements of his pleader before that officer, leave no doubt in their Lordships' mind that his present allegation is unfounded. The passage in the Deputy Commissioner's judgment which gives the substance of these statements is important. After reciting some of the facts connected with the dispute before him, the judgment proceeds thus :

"Ultimately on the 29th February, 1901, [sic], by virtue of a compromise, the name of Bakht Narain was entered as *manager* and *head* of a joint Hindu family. By a clause at the end of this agreement Bakht Narain was to remain so recorded so long as there should be no dispute among the *warisan*. There is now a discussion as to the meaning of the word *warisan*.

"Mr. Jackson for appellant argues that it clearly refers to the *heirs* of the executant of the compromise. Mr. Champat Rai for the respondent maintains that it refers to the executants themselves; and as they are now in disagreement he wishes to have his client's name recorded in the Government registers.

"Here it is necessary to say that there is a third party, Raj Indar Narain, said to be the adopted son of Ram Narain.

"Bakht Narain now denies the validity of the adoption."

And the order is, "I think that Suraj Narain and Raj Indar Narain" (the applicants in that case) "should go to the Civil Court and get their shares clearly defined."

(1) (1846) 4 Moo. I. A., 137.

The statement of Mr. Champat Rai appears to their Lordships to involve a clear admission that the joint status had continued all then; and that as the parties were, to use his words as recorded by the Deputy Commissioner, "now in disagreement," he wished to have his client's name recorded in the Government registers.

After the dismissal of his application, as already observed,

Suraj Narain went away to Amethi without making an attempt to go to the Civil Court. Although Suraj Narain made various attempts to come in as a plaintiff in the suit Bakht Narain had brought against Ratan Lal, it may be taken as well established that after the Deputy Commissioner's order matters remained in *statu quo* until the present action was instituted. Their Lordships are of opinion that the allegation regarding a separation in October, 1901, of rights in property fails, and that the view of the learned Judges in the court below is well founded, that the plaintiffs are not entitled to claim mesne profits on that basis.

But it is urged that as the plaintiffs did not, after the disputes arose between the two brothers, receive any profits from the joint estate, they are entitled to mesne profits on the ground of exclusion. The evidence is clear and distinct on this point, and shows that Bakht Narain was all along offering Suraj Narain an allowance of Rs. 200 a month, which he refused to accept as being inadequate. This certainly does not, in their Lordships' judgement, amount to exclusion from the joint estate.

On the whole their Lordships are of opinion that this appeal fails and ought to be dismissed with costs, and their Lordships will humbly advise His Majesty accordingly.

Appeal dismissed.

Solicitors for the appellants:—*Barrow, Rogers and Nevill.*

Solicitors for the respondents:—*Pemberton, Cope, Gray & Co.*

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APPELLATE CIVIL.

Before Mr. Justice Banerji.

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AND ANOTHER (OPPOSITE PARTIES).*

Criminal Procedure Code, section 195, clauses (b) and (c)—Sanction to

prosecute—Power of appellate court to grant sanction—Appeal—Revision.

Held that the appellate Court, equally with the court of first instance, has power to grant sanction for a prosecution in respect of a document filed or evi-

dence recorded in the suit.

Held, also, that a petition under section 195 (6) of the Code of Criminal Procedure seeking the cancellation of an order under section 195 (1) should be classed as a criminal appeal.

THE facts of this case were as follows :—

A suit was brought on a bond in the court of the Munsif of Basti. In the course of that suit, the appellants produced the original bond, which was the basis of the claim, with an endorsement on it purporting to be an endorsement of payment of the amount due upon the bond. Witnesses were examined to support the endorsement. The court of first instance held that the endorsement was a forgery. An appeal was preferred and was heard by the Additional Judge of Basti. He also was of opinion that the endorsement was forged and the evidence given in support of it was false. He affirmed the decree of the court of first instance. An appeal preferred to the High Court was dismissed under the provisions of order XLI, rule 11, of the Code of Civil Procedure. After these proceedings in the Civil Court, the plaintiffs to the suit made an application to the Additional Judge of Basti for sanction to prosecute Bhadesar Tiwari and others, and this application was granted. The persons against whom the sanction was thus given thereupon filed a petition in the High Court under section 195 (6) of the Code of Criminal Procedure.

Mr. A. H. C. Hamilton for the appellants.

The Hon'ble Pandit *Moti Lal Nehru*, for the respondents.

BANERJI, J.:—This is an appeal from an order of the Additional Judge of Basti granting sanction for the prosecution of the appellants for offences punishable under sections 471 and 193 of the Indian Penal Code. The appeal, being one from an order passed

* First Appeal No. 101 of 1912 from an order of H. M. P. Rose, Additional Judge of Gorakhpur, dated the 18th of June, 1912.

under section 195 of the Code of Criminal Procedure, should be

deemed to be an appeal under that Code and thus a criminal appeal. It should have been registered as such, and I have heard it as a criminal appeal. It appears that a suit was brought on a bond in the court of the Munsif of Basti. In the course of that suit, the appellants produced the original bond, which was on the basis of the claim, with an endorsement on it purporting to be an endorsement of payment of the amount due upon the bond. Witnesses were examined to support the endorsement. The court of first instance held that the endorsement was a forgery. An appeal was preferred and was heard by the Additional Judge of Basti. He also was of opinion that the endorsement was forged and the evidence given in support of it was false. He affirmed the decree of the court of first instance. An appeal preferred to this Court was, I am informed, dismissed under the provisions of order XLI, rule 11, of the Code of Civil Procedure. After these proceedings in the Civil Court, the plaintiffs to the suit made an application to the Additional Judge of Basti for sanction to prosecute the present appellants, and on this application the order giving sanction now complained of was made.

It is urged on behalf of the appellants that the Additional Judge of Basti had no jurisdiction to give the sanction asked for. In my opinion, this contention is untenable. The document which was found to be forged was given in evidence in the suit, which, in the stage of appeal, was pending in the court of the Additional Judge. It was thus given in evidence in a proceeding in the court of the Additional Judge. Similarly, the false evidence was given in a proceeding which was pending in the stage of appeal in the Additional Judge's court. Therefore, under clauses (b) and (c) of section 195 the learned Additional Judge was competent to sanction the prosecution of the appellants. It is true that the document was not produced in his court but it was given in evidence in the appeal which was pending in that court. That appeal was certainly a proceeding within the meaning of section 195. The Additional Judge had, therefore, jurisdiction to make the order appealed against and this appeal must fail. I accordingly dismiss it.

[But see *Mehdi Hasan v. Zola Ram*, I. L. R., 16 All., 61.—Ed.]

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Banerji.
BHADRESAR TIWARI AND OTHERS (APPELLANTS) v. KAMTA PRASAD
AND ANOTHER (OPPOSITE PARTIES).*

Criminal Procedure Code, section 195, clauses (b) and (c)—Sanction to prosecute—Power of appellate court to grant sanction—Appeal—Revision.

Held that the appellate court, equally with the court of first instance, has power to grant sanction for a prosecution in respect of a document filed or evidence recorded in the suit.

Held, also, that a petition under section 195 (b) of the Code of Criminal Procedure seeking the cancellation of an order under section 195 (1) should be classed as a criminal appeal.

The facts of this case were as follows :—

A suit was brought on a bond in the court of the Munsif of Basti. In the course of that suit, the appellants produced the original bond, which was the basis of the claim, with an endorsement on it purporting to be an endorsement of payment of the amount due upon the bond. Witnesses were examined to support the endorsement. The court of first instance held that the endorsement was a forgery. An appeal was preferred and was heard by the Additional Judge of Basti. He also was of opinion that the endorsement was forged and the evidence given in support of it was false. He affirmed the decree of the court of first instance. An appeal preferred to the High Court was dismissed under the provisions of order XL1, rule 11, of the Code of Civil Procedure. After these proceedings in the Civil Court, the plaintiffs to the suit made an application to the Additional Judge of Basti for sanction to prosecute Bhadesar Tiwari and others, and this application was granted. The persons against whom the sanction was thus given thereupon filed a petition in the High Court under section 195 (6) of the Code of Criminal Procedure.

Mr. A. H. C. Hamilton for the appellants.

The Hon'ble Pandit *Moti Lal Nehru*, for the respondents.

BANERJI, J.:—This is an appeal from an order of the Additional Judge of Basti granting sanction for the prosecution of the appellants for offences punishable under sections 471 and 193 of the Indian Penal Code. The appeal, being one from an order passed

* First Appeal No. 101 of 1912 from an order of H. E. P. Rose, Additional Judge of Gorakhpur, dated the 13th of June, 1912.

under section 195 of the Code of Criminal Procedure, should be deemed to be an appeal under that Code and thus a criminal appeal. It should have been registered as such, and I have heard it as a criminal appeal. It appears that a suit was brought on a bond in the court of the Munsif of Basti. In the course of that suit, the appellants produced the original bond, which was the basis of the claim, with an endorsement on it purporting to be an endorsement of payment of the amount due upon the bond. Witnesses were examined to support the endorsement. The court of first instance held that the endorsement was a forgery. An appeal was preferred and was heard by the Additional Judge of Basti. He also was of opinion that the endorsement was forged and the evidence given in support of it was false. He affirmed the decree of the court of first instance. An appeal preferred to this Court was, I am informed, dismissed under the provisions of order XLI, rule 11, of the Code of Civil Procedure. After these proceedings in the Civil Court, the plaintiffs to the suit made an application to the Additional Judge of Basti for sanction to prosecute the present appellants, and on this application the order giving sanction now complained of was made.

It is urged on behalf of the appellants that the Additional Judge of Basti had no jurisdiction to give the sanction asked for. In my opinion, this contention is untenable. The document which was found to be forged was given in evidence in the suit, which, in the stage of appeal, was pending in the court of the Additional Judge. It was thus given in evidence in a proceeding in the court of the Additional Judge. Similarly, the false evidence was given in a proceeding which was pending in the stage of appeal in the Additional Judge's court. Therefore, under clauses (b) and (c) of section 195 the learned Additional Judge was competent to sanction the prosecution of the appellants. It is true that the document was not produced in his court but it was given in evidence in the appeal which was pending in that court. That appeal was certainly a proceeding within the meaning of section 195. The Additional Judge had, therefore, jurisdiction to make the order appealed against and this appeal must fail. I accordingly dismiss it.

[But see *Mehar Hasan v. Toia Ram*, 1 L. R., 15 All., 61—P.D.]

Appeal dismissed.

Before Mr Justice Tudball

OHHABRAJI KUNWAR AND OTHERS (DEFENDANTS) v. THE COURT OF

WARDS AND OTHERS (PLAINTIFFS). *

Act No. VII of 1870 (*Court Fees Act*), section 7, clause IX—Decree on mortgage—*Separate liabilities of distinct properties*—Appeal in respect of distinct properties.

In a suit for sale on a mortgage a decree was passed declaring the separate liabilities of the different properties mortgaged. One of the defendants, whose property was held liable for specific sums of money, appealed. *Held* that the proper court fee payable on the memorandum of appeal was a fee calculated on the sum of money for which the defendant's property was held liable, and not one calculated on the full amount of the decree.

THIS was a reference as to amount of court fee payable in this case on the memorandum of appeal. The following report of the office gives the material facts:—

"The plaintiff brought the suit out of which this appeal has arisen for recovery of Rs. 48,000 principal and interest on foot of a mortgage, dated the 28th of March, 1909, by enforcement of hypothecation lien. The original document, the basis of the suit, was not produced, as it could not be found, and the suit was brought on the basis of a copy of the bond.

"The suit was resisted on various grounds. However, the court below decreed the plaintiff's claim for Rs. 14,554-7-0 of the amount claimed together with *pendente lite* interest and proportionate costs and made the different properties liable for the rateable contribution. The property of mauza Bisoha was made liable to contribute Rs. 6,215-0-8, and of Tehra Man Rs. 1,012-11-5. These are the two properties with which we are concerned in this appeal. "A decree for sale under order XXXIV, rule 4, was prepared. The decree awarded to the plaintiffs—

1. Rupees 14,554-7-0, principal and interest on foot of mortgage.
2. Rupees 11,220-14-0, *pendente lite* interest.
3. Rupees 622-9-6, proportionate costs.

Total, Rs. 26,397-14-6.

"Against the said decree the defendants abovenamed have preferred this appeal praying that the suit may be dismissed against them. The appeal is valued at Rs. 7,227-12-1 the

"In the face, however, of your order of 23rd February, 1912, order XVI, rule 33, of Civil Procedure Code, and taxing officer's ruling of 27th February, 1912, in S. A. No. 680 of 1911, where a part of the property was exempted in the decree, I do not agree. "But the matter is one of general importance, and under section 5 of the Court Fees Act, I beg to refer the matter."

The following decision was given by the Taxing Judge. TUDBAL, J.:—This case is clearly distinguishable from the case in F. A. No. 197 of 1912. Here various properties have been held separately liable for separate sums of money. The present appellants are transferees of two parts of property which have been held liable for specific sums of money. If they succeed in their appeal it is only those properties which will be released from the operation of the decree and it is only these sums which the decree-holder will lose. The rest of the decree-holder's decree for various other sums and for various other properties will still hold good even if the appellants' appeal succeeds. The correct stamp on this appeal will be Rs. 365. I allow one fortnight to make good the deficiency.

Order accordingly.

Before Mr. Justice Tudbal and Mr. Justice Muhammad Rafiq. BALDEO SINGH AND ANOTHER (PLAINTIFFS) v. KALKA PRASAD AND ANOTHER (DEFENDANTS).
1912, number, 25.

Act No. VII of 1870 (Court Fees Act), section 7, clause IX—Suit for sale on a mortgage—Court fee payable in appeal—Value of the subject matter—Amount declared due on date fixed for payment.

A decree for sale on a mortgage declared that on the date fixed for payment a specified sum would be due from the mortgagor, which included interest *pendente lite*. Held that the court fee payable in appeal from such decree was to be assessed, not on the amount claimed in the suit but upon the amount with interest *pendente lite* found due by the court of first instance at the date fixed for payment.

THE question in this case was as to the amount upon which the court fee is payable on a memorandum of appeal against a decree awarding mortgage money with interest *pendente lite* to date

*Second Appeal No. 251 of 1912 from a decree of H. C. Allen, District Judge of Mainpuri, dated the 21st of December, 1911, reversing a decree of Pratap Singh, Additional Subordinate Judge of Etawah, dated the 10th of July, 1911.

of payment and declaring the amount so awarded. The following

extract from the office report gives the material facts.

"The plaintiffs brought a suit for recovery of Rs. 1,191-11-6 on account of principal and interest calculated up to the date of suit on foot of a mortgage, dated the 7th December, 1885, executed by the ancestor of the defendants in favour of one of the plaintiffs and ancestors of the other plaintiffs.

"The court of first instance decreed the plaintiffs' claim with future interest till the expiry of six months from the date of decree at the bond rate and allowed no interest thereafter. A decree for sale under order XXXIV, rule 4, of the Code of Civil Procedure was accordingly drawn up which awarded to the plaintiffs a sum of Rs. 1,487-7-6 composed of the following items.

Rs. 1,191-11-6 amount claimed.

Rs. 129-12-0 *pendente lite* interest.

Rs. 166 costs of the suit.

Total Rs. 1,487-7-6.

"Against the said decree the defendants preferred an appeal to the lower appellate court valuing it at Rs. 1,191-11-6, the amount originally claimed by the plaintiffs, and paying a court fee of Rs. 85, as was paid by the plaintiffs on the plaint, and praying for a reversal of the decree of the court of first instance. The only ground taken in the memorandum of appeal was to the effect:—"It is fully proved from the evidence and probabilities that the consideration of the bond in suit has been paid off. The lower court is not right in its finding to the contrary." The lower appellate court allowed the appeal and dismissed the plaintiffs' suit. Hence the plaintiffs have preferred this second appeal.

"According to the long established practice of this Court I reported on 18th June, 1912, that the proper valuation of the appeal inclusive of *pendente lite* interest was Rs. 1,321-6-6 on which a court fee of Rs. 95 was payable, and that a court fee of Rs. 85 having been paid there was therefore a deficiency of Rs. 10 due by the defendants for the lower appellate court. The report was initialled by the learned vakil for the defendants respondents on the 20th June, 1912. He did not dispute the accuracy of the report within three weeks thereafter under rule 10,

chapter III. The report was laid before the Hon'ble Judge receiving applications by order of the taxing officer. The Hon'ble Judge ordered the matter to be laid before the taxing officer who after referring the matter to the learned counsel, and consulting the Hon'ble Taxing Judge, to the best of my recollection, passed the following order on the 22nd July, 1912. 'It is not open to the learned vakil to dispute the accuracy of the office report now. He should have objected within three weeks of the 20th June, 1912. He is time-barred by rule 10, chapter III, High Court Rules.'

"On the matter coming on again before the Hon'ble Judge receiving applications on 6th August, 1912, the report was disputed a second time, and it was directed that the matter should be referred to the Bench hearing the appeal.

"In spite of the order of the taxing officer with reference to the Hon'ble Court's Rules quoted above, it is, I respectfully submit, expedient that the question of *pendente lite* interest should be decided once for all as there are several other similar objections raised by the learned vakils in other cases and our present-taxing officer has been pleased to order that they should be kept in abeyance pending orders of the Hon'ble Court in this particular case."

The taxing officer thereupon recorded as follows:—"It is important that a final decision should be reached on the questions raised by the taxing clerk. I am in entire agreement with the decisions of the previous taxing officers Messrs. Hose and Burkill."

Babu Sital Prasad Ghose for the respondent.

The words "*the amount claimed*" in section 7 of the Court Fees Act mean, the specific amount claimed in the plaint, that is, the amount of principal and interest up to the date of the suit. There being no provision in the Act for paying court fees upon interest *pendente lite*, upon the analogy of the provision of section 11 of the Court Fees Act relating to mesne profits, it follows that the words "subject matter in dispute" in article 1, schedule 1 of the Act must mean either the whole or a portion of the "amount claimed" which was the only thing upon which the parties joined issue. In the present case the appellants in the lower

appellate court did not challenge the adjudication of the court of first instance with regard to interest *pendente lite* under section 34 of the Code of Civil Procedure. Therefore no question of such interest ever formed "the subject matter in dispute in appeal" to that court.

The Hon'ble Dr. Sundar Lal, for the appellant, was not called on to reply.

TUDBAL and MUHAMMAD RAFIQ, J. J.:—This suit was one for sale on the basis of a mortgage. The plaintiffs claimed a certain sum as principal with interest up to the date of institution together with *pendente lite* and future interest and in default of payment, asked for sale of the property. The main defence was that the debt had been satisfied. The first court held in favour of the plaintiffs and passed a decree, which is worded as follows:—"This suit coming on this 10th of July 1911, it is hereby declared that the amount due to the plaintiffs on account of principal, interest and costs, calculated up to the 9th day of January, 1912, is Rs. 1,487-7-6 and it is decreed as follows. No order is passed as to future interest.

(1) That if the defendant pays into court the amount so declared due on or before the said 9th day of January, 1912, the plaintiff shall deliver up to the defendant or to such person as he appoints, all documents in his possession or power relating to the property and shall, if so required, retransfer the property to the defendant free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him.

(2) That, if such payment is not made on or before the said day of 9th January, 1912, the mortgaged property or a sufficient part thereof, be sold, and that the proceeds of the sale, &c."

From this decree the defendants appealed, and the sole ground of appeal was that it had been fully proved by evidence that the consideration of the bond had been paid off. They valued the appeal at Rs. 1,191-11-6, the amount of the principal, plus interest up to the date of the institution of the suit, as claimed by the plaintiffs, and they paid court fees accordingly. The lower appellate court held in their favour and dismissed the suit on a preliminary point. The plaintiffs have come up here on appeal. The taxing officer has reported that the defendants on their

an inquiry under section 202 of the Code or after issue of summons to the accused person. My attention has been called to certain rulings of this Court, e.g. *Queen Empress v. Ajudha* (1), but an examination of these rulings shows that they were all cases in which the accused was tried and discharged and a further inquiry was ordered behind his back and without notice issued to him. The present is not a case in which it was necessary to issue notice to the accused persons before ordering further inquiry. I therefore reject the application. The proceedings which have been stayed will be continued.

Application rejected.
(1) (1893) I.L.R., 20 All., 339.

He also claimed *mesne profits* on the ground of exclusion from the joint family, as he had not since 1901 received any share of the profits of the joint property. *It* held that although he had not received any of the profits of the joint estate, the evidence was clear that the appellant was offered an allowance from the profits of the joint property which he refused to accept as being inadequate, and that would not amount to exclusion.

APPEAL from a decree (30th October, 1909) of the Court of the Judicial Commissioner of Oudh which varied a decree (27th August, 1908) of the Additional Judge of Hardoi.

The only question for determination on this appeal was whether the appellants were entitled to a decree for *mesne profits* against the respondents, in addition to the decree for partition of their joint properties.

The facts are for the purpose of this report sufficiently stated in the judgement of their Lordships of the Judicial Committee.

The appellant Suraj Narain, with his two sons as co-plaintiffs, instituted the suit which gave rise to this appeal, against Bakht Narain and his family (defendants nos. 1 to 6) and also against Ratan Lal, Madan Mohan Lal, and Kishan Lal (defendants nos. 7 to 9). He claimed that the properties in the names of the defendants nos. 7 to 9 belonged to the joint family, alleging that they had wrongly taken possession of them in collusion with Bakht Narain. He alleged that he had totally separated himself from Bakht Narain at the end of October, 1901, and that there had been a "legal partition" of the properties, first made in November, 1900, and completed in October, 1901, and he prayed for possession of his half share of the joint family properties, for *mesne profits*, and other relief.

The defence was a denial of the separation and partition alleged, and also of the right of the plaintiffs to *mesne profits*.

The only issue now material was the 16th, which was as follows:—Can the plaintiffs claim accounts and *mesne profits* from the defendants nos. 1 to 5, and what is the amount of the latter?

The Additional Judge of Hardoi held that Suraj Narain had separated from the family as alleged by him; that since his separation he had been excluded from the joint family property, and that he was consequently entitled to the *mesne profits* of his half share. He accordingly made a decree for possession of one-half share in the joint property with *mesne profits*.

On appeal the court of the Judicial Commissioner, Mr. L. G. EVANS, Judicial Commissioner, and Mr. T. C. PIGGOTT, 2nd Additional Judicial Commissioner, after discussing the evidence at considerable length, came to the conclusion that neither separation nor exclusion had been proved, and that the claim for mesne profits was consequently not sustainable. In the result a decree for an account was made.

On the main point in the case, the proof of separation, the judgement of the Judicial Commissioner's court (which was delivered by Mr. PIGGOTT and concurred in by Mr. EVANS, after referring to the cases which had been cited in argument, continued:—

"Mr. Justice Starkby was decidedly of opinion that it followed from the principles laid down by their Lordships of the Privy Council in *Alford's case* that one member of a joint family might turn his joint ownership of the family property into a tenancy in common within the meaning of that ruling by merely signifying to the other members of the family an intention to that effect. We have not been referred to any Privy Council case which goes so far as this; and it seems to me that the principle thus broadly stated cannot be affirmed without serious qualification. It would surely not be contended that, if one of two brothers who had up to that moment lived together as members of joint family were to say to another, at the end of some quarter over family matters, 'Very well then, if you insist on treating me so badly, I intend to separate from you from this moment. You do not deny that my share in the family property is equal to yours, and I intend from henceforth to regard myself as the separate owner of my own half share,' such words would in themselves, and apart from any evidence of the subsequent conduct of the two brothers, have the effect of producing separation between them in law. The court would require at the very least to be satisfied that the subsequent conduct of the brother who had thus spoken was such as to put it beyond question that his words were not merely spoken in the heat of the moment, or intended as a threat to put pressure upon his brother and compel the latter to show more respect to his wishes, but embodied his deliberate purpose, consistently adhered to and evidenced by his subsequent actions. Moreover, there would have to be no room for doubt in the mind of the court that the parties concerned were entirely agreed as to the share in the family property each of them would have to take in the event of a separation. Personally I am not sure that even these qualifications are sufficient; or perhaps I might express my point more correctly by saying that I should require clear evidence of subsequent action on the part of the brother who had expressed his intention to separate with a view to acquitting, with as little delay as was reasonably possible under the circumstances, the separate control and enjoyment of the share claimed by him in the family property after separation. In the absence of such action on his part, I hold that a strong presumption would arise in favour of his having reconsidered the intention expressed by him in the heat of the moment and acquiesced in the continuance of the family in a

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state of jointness. Applying these principles to the facts of the present case, it does not seem to me that anything like a sufficient case is made out in favour of the proposition that Pandit Suraj Narain on behalf of himself and his minor sons separated from Pandit Bakht Narain and his branch of the family, either in the month of March, 1901, or at any subsequent date prior to the institution of Pandit Suraj Narain's suit on June 20th, 1905."

On the other branch of the plaintiff's case, namely, that Suraj Narain was in any event entitled to mesne profits as a member of a joint family who had been for years before the institution of the suit excluded from all participation in the joint family property, the appellate court said:—

"It must be remembered that we are dealing in this case with the members of a joint family who were often widely separated in residence, and who exercised their respective professions, or carried on various branches of business, without reference to any joint family account. . . . Under these circumstances the mere fact of non-participation by Suraj Narain in the profits of the joint family between the years 1901 and 1905 supposing such non-participation to be fully established, could scarcely be regarded as such evidence of exclusion as would justify a subsequent claim for mesne profits. . . . When Suraj Narain went away and took up employment in the Amriti estate without taking any further action, he seems to me, as I have already remarked, to have continued in the existing state of affairs under which Pandit Narain remained in possession of the joint family property as manager, pending the settlement of outstanding accounts and debts. Under these circumstances, I am of opinion that the claim for mesne profits cannot be brought and that the lower court was in error in granting a decree for the same."

The account directed was "an account of the income enjoyed

by the defendant (and by Pandit Bakht Narain before his death) from the date of the institution of the plaintiff's suit on June 20th, 1905, to the date on which possession was given to the plaintiff under the decree now appealed against, from the income of the property of the joint family in respect of which the plaintiff has been found to be entitled to a half share. The defendant will be entitled to set off against that income, not only the expenses of management, but all expenditures which the court may find to have been properly incurred and claims to which the income of the joint family may properly be applied by the manager of the same. The balance, if any, will be treated as part of the plaintiff's share of the joint family, subject to the claim of mesne profits in the hands of the defendant, and the plaintiff will be awarded the half of the same."

On this appeal—

ified a decree for mesne profits. The decree of the court below
right and should be affirmed.

De Gruyther, K. C., replied.

1912, December 10th :—The judgement of their Lordships
s delivered by Mr. AMEER ALI :—

The point for determination involved in this appeal turns
the question whether the plaintiffs, who were admittedly
members of a joint Hindu family governed by the Mitakshara
w, separated, as they allege, in October, 1901, or whether
they continued joint in property, if not in food and worship, as
the defendants contend, up to the institution of the suit in 1905.

The parties are Kashmiri Brahmins settled in Oudh, and, with
the exception of the defendant Ratan Lal, are descended from one
Pandit Bishan Narain who died over 40 years ago. He left four
sons, of whom Pandit Suraj Narain the first plaintiff is the only
one now surviving. On Bishan Narain's death his eldest son Raj
Narain became the *karta* of the joint family. On his death in
1890, Ram Narain, the next in order of seniority, assumed charge
of the family estate. He died in October, 1900, leaving a daughter
who is married to the defendant Ratan Lal. Her son Raj Indar
Narain appears to have been adopted by Ram Narain, and
although his name frequently appears in the course of the present
litigation he is no party to the action. On the death of Ram
Narain, the defendant Bakht Narain, who has died since the
institution of this suit, applied in November, 1900, for mutation of
names in the Collector's register in respect of the joint family
property. On the 8th of December, 1900, Suraj Narain filed a peti-
tion objecting to the mutation being effected in Bakht Narain's
name alone, and praying that his name along with the plaintiffs'
and Raj Indar Narain's might be entered in equal shares

Some action appears to have been taken by the revenue autho-
rities on the application of Bakht Narain, but before any definite
order was made, the parties came to a settlement which was
embodied in a deed of compromise. This document bears date
the 27th February, 1901, and after reciting the facts connected
with Suraj Narain's application, proceeds to state as follows:—

"Hence, in submitting this application we pray that mutation of names be
effected in favour of Pandit Bakht Narain alone as the head of a joint family

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and the status of the family has continued joint from the death of Pandit Ram Narain up to this day and shall remain so as long as any dispute does not arise among the heirs."

Bakht Narain's name was accordingly entered with regard to the entire joint estate, and matters apparently remained *in statu quo* for the next two years. In consequence of some quarrel with his elder brother, Suraj Narain, on the 5th of May, 1903, applied to the revenue authorities to have his and Raj Indar Narain's names entered jointly in respect of two-thirds of the family properties.

The differences between the brothers seem to have been mainly connected with the question of the shares the two branches of the family would take upon a partition. As Bakht Narain had three sons and Suraj Narain had only two, the latter evidently apprehended that if the division were to be made *per capita* his branch would obtain a smaller share. The compromise of February, 1901, which provided for a reference to the Advocate-General was really intended to remove this fear on the part of Suraj Narain.

On the 31st August, 1903, the Assistant Collector made an order in favour of Suraj Narain. This order was reversed on appeal by the Deputy Commissioner on the 30th of October, 1903. The Deputy Commissioner embodies in his judgement the actual contentions advanced before him by the parties, which afford a strong indication of the views they then took of the position of the family. Their Lordships will refer to this document when dealing with the arguments at the Bar on this appeal.

After the Deputy Commissioner's order, Suraj Narain returned to the service of the Amethi Estate and remained there up to the end of 1904. In June, 1905 he, in conjunction with his surviving son, brought the present suit against Bakht Narain and his sons for a partition of the family properties. The various proceedings in the suit of Bakht Narain against Ratan Lal, in which Suraj Narain attempted to be joined as a plaintiff, have no direct bearing on the question their Lordships have to consider.

In the present action, the plaintiffs, Suraj Narain and his son, claimed to recover mesne profits from Bakht Narain and his branch of the family, on the ground that they had separated from the joint family in October, 1901. Their contention was accepted by the Subordinate Judge, who made a decree in their favour on

that basis. The Judicial Commissioners have on appeal reversed his decision; and the present appeal to his Majesty in Council is from their judgement. The learned Judges have carefully and elaborately examined the evidence on the question of the alleged separation in October, 1901; and as their Lordships agree with the main conclusions of the court below, they do not consider it necessary to deal with the matter in detail.

The principle applicable to cases of separation from the joint undivided family has been clearly enunciated by this Board in *Rewun Persad v. Radha Beeby* (1) and the well-known case of *Appovier v. Rama Subba Aiyar* (2). What may amount to a separation or what conduct on the part of some of the members may lead to disruption of the joint undivided family and convert a joint tenancy into a tenancy in common must depend on the facts of each case. A definite and unambiguous indication by one member of intention to separate himself and to enjoy his share in severalty may amount to separation. But to have that effect the intention must be unequivocal and clearly expressed. In the present case that element appears to their Lordships to be wholly wanting. By the compromise of February the parties had agreed to retain the status of jointness which had existed till then "until any dispute arose among the heirs." Suraj Narain alleges that he separated a few months later; there is, however, no writing in support of his allegation, nothing to show that at that time he gave expression to an unambiguous intention on his part to cut himself off from the joint undivided family. The oral evidence on which the allegation has mainly rested, as the learned Judges in the court below point out, is either inconclusive or unreliable. On the other hand, his conduct, borne out by documents, is clearly against his contention. After the compromise of February, 1901, the mutation proceedings instituted by Bakht Narain in November, 1900, were continued, and on the 2nd of January, 1902, the revenue officer directed that the statements of the two brothers should be recorded "to ascertain in whose name the entry should be made." And on the 8th of February the officer in question made the following order:—

"As the statements of Pandit Bakht Narain and Suraj Narain have been received and they unanimously show their willingness for the entry of the name

(1) (1846) 4 Moo. I. A., 137.

(2) (1866) 11 Moo. I. A., 75.

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of Bakht Narain and declare his possession also, and as no one has filed any objection, it is therefore ordered that, after expunging the name of Ram Narain, deceased, the name of Bakht Narain be entered and the file be submitted to the officer in charge of pargana for sanction."

The conduct of Suraj Narain on this occasion was certainly not consistent with his allegation that he had severed his connection with the joint family, of which Bakht Narain was the acknowledged "head," in October, 1901.

In his application of the 5th May, 1903, among other matters, he speaks of a separation in "mess and worship," but there is no mention of a division of rights in property. Had his present statement been true, some reference would unquestionably have been made to it in this document. Separation from commensality, as was observed in the case of *Rewun Persad v. Radha Beeby* (1) does not as a necessary consequence effect a division of the joint undivided property. A separation in mess and worship may be due to various causes, and yet the family may continue joint in estate. In the present case there is evidence to show it arose from a difference in the religious opinions of the two brothers.

But the conduct of Suraj Narain after the order of the Deputy Commissioner on the 30th October, 1903, and the statements of his pleader before that officer, leave no doubt in their Lordships' mind that his present allegation is unfounded. The passage in the Deputy Commissioner's judgement which gives the substance of these statements is important. After reciting some of the facts connected with the dispute before him, the judgement proceeds thus :

"Ultimately on the 29th February, 1901, [sic], by virtue of a compromise, the name of Bakht Narain was entered as *manager* and *head* of a joint Hindu family. By a clause at the end of this agreement Bakht Narain was to remain so recorded so long as there should be no dispute among the *warisan*. There is now a discussion as to the meaning of the word *warisan*.

"Mr. Jackson for appellant argues that it clearly refers to the *heirs* of the executant of the compromise. Mr. Champat Rai for the respondent maintains that it refers to the executants themselves; and as they are now in disagreement he wishes to have his client's name recorded in the Government registers.

"Here it is necessary to say that there is a third party, Raj Indar Narain, said to be the adopted son of Ram Narain.

"Bakht Narain now denies the validity of the adoption."

And the order is, "I think that Suraj Narain and Raj Indar Narain" (the applicants in that case) "should go to the Civil Court and get their shares clearly defined."

(1) (1846) 4 Moo. I. A., 137.

The statement of Mr. Champat Rai appears to their Lordships to involve a clear admission that the joint status had continued till then; and that as the parties were, to use his words as recorded by the Deputy Commissioner, "now in disagreement," he wished to have his client's name recorded in the Government registers.

After the dismissal of his application, as already observed, Suraj Narain went away to Amethi without making an attempt to go to the Civil Court. Although Suraj Narain made various attempts to come in as a plaintiff in the suit Bakht Narain had brought against Ratan Lal, it may be taken as well established that after the Deputy Commissioner's order matters remained *in statu quo* until the present action was instituted. Their Lordships are of opinion that the allegation regarding a separation in October, 1901, of rights in property fails, and that the view of the learned Judges in the court below is well founded, that the plaintiffs are not entitled to claim mesne profits on that basis.

But it is urged that as the plaintiffs did not, after the disputes arose between the two brothers, receive any profits from the joint estate, they are entitled to mesne profits on the ground of exclusion. The evidence is clear and distinct on this point, and shows that Bakht Narain was all along offering Suraj Narain an allowance of Rs. 200 a month, which he refused to accept as being inadequate. This certainly does not, in their Lordships' judgement, amount to exclusion from the joint estate.

On the whole their Lordships are of opinion that this appeal fails and ought to be dismissed with costs, and their Lordships will humbly advise His Majesty accordingly.

Appeal dismissed.

Solicitors for the appellants :—*Barrow, Rogers and Nevill.*

Solicitors for the respondents :—*Pemberton, Cope, Gray & Co.*

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APPELLATE CIVIL.

Before Mr. Justice Banerji.

BHADESAR TIWARI AND OTHERS (APPLICANTS) v. KAMTA PRASAD
AND ANOTHER (OPPOSITE PARTIES).*

Criminal Procedure Code, section 195, clauses (b) and (c)—Sanction to prosecute—Power of appellate court to grant sanction—Appeal—Revision.

Held that the appellate Court, equally with the court of first instance, has power to grant sanction for a prosecution in respect of a document filed or evidence recorded in the suit.

Held, also, that a petition under section 195 (6) of the Code of Criminal Procedure seeking the cancelment of an order under section 195 (1) should be classed as a criminal appeal.

THE facts of this case were as follows :—

A suit was brought on a bond in the court of the Munsif of Basti. In the course of that suit, the appellants produced the original bond, which was the basis of the claim, with an endorsement on it purporting to be an endorsement of payment of the amount due upon the bond. Witnesses were examined to support the endorsement. The court of first instance held that the endorsement was a forgery. An appeal was preferred and was heard by the Additional Judge of Basti. He also was of opinion that the endorsement was forged and the evidence given in support of it was false. He affirmed the decree of the court of first instance. An appeal preferred to the High Court was dismissed under the provisions of order XLI, rule 11, of the Code of Civil Procedure. After these proceedings in the Civil Court, the plaintiffs to the suit made an application to the Additional Judge of Basti for 'sanction to prosecute Bhadesar Tiwari and others, and this application was granted. The persons against whom the sanction was thus given thereupon filed a petition in the High Court under section 195 (6) of the Code of Criminal Procedure.

Mr. A. H. C. Hamilton for the appellants.

The Hon'ble Pandit Moti Lal Nehru, for the respondents.

BANERJI, J.:—This is an appeal from an order of the Additional Judge of Basti granting sanction for the prosecution of the appellants for offences punishable under sections 471 and 193 of the Indian Penal Code. The appeal, being one from an order passed

* First Appeal No. 101 of 1912 from an order of E. E. P. Rose, Additional Judge of Gorakhpur, dated the 13th of June, 1912.

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under section 195 of the Code of Criminal Procedure, should be deemed to be an appeal under that Code and thus a criminal appeal. It should have been registered as such, and I have heard it as a criminal appeal. It appears that a suit was brought on a bond in the court of the Munsif of Basti. In the course of that suit, the appellants produced the original bond, which was the basis of the claim, with an endorsement on it purporting to be an endorsement of payment of the amount due upon the bond. Witnesses were examined to support the endorsement. The court of first instance held that the endorsement was a forgery. An appeal was preferred and was heard by the Additional Judge of Basti. He also was of opinion that the endorsement was forged and the evidence given in support of it was false. He affirmed the decree of the court of first instance. An appeal preferred to this Court was, I am informed, dismissed under the provisions of order XLI, rule 11, of the Code of Civil Procedure. After these proceedings in the Civil Court, the plaintiffs to the suit made an application to the Additional Judge of Basti for sanction to prosecute the present appellants, and on this application the order giving sanction now complained of was made.

It is urged on behalf of the appellants that the Additional Judge of Basti had no jurisdiction to give the sanction asked for. In my opinion, this contention is untenable. The document which was found to be forged was given in evidence in the suit, which, in the stage of appeal, was pending in the court of the Additional Judge. It was thus given in evidence in a proceeding in the court of the Additional Judge. Similarly, the false evidence was given in a proceeding which was pending in the stage of appeal in the Additional Judge's court. Therefore, under clauses (b) and (c) of section 195 the learned Additional Judge was competent to sanction the prosecution of the appellants. It is true that the document was not produced in his court but it was given in evidence in the appeal which was pending in that court. That appeal was certainly a proceeding within the meaning of section 195. The Additional Judge had, therefore, jurisdiction to make the order appealed against and this appeal must fail. I accordingly dismiss it.

[But see *Mehdi Hasan v. Tola Ram*, I. L. R., 15 All., 61,—Ed.]

Appeal dismissed.

1912
November, 22

APPELLATE CIVIL.

Before Mr. Justice Banerji.

BHADESAR TIWARI AND OTHERS (APPLICANTS) v. KAMTA PRASAD
AND ANOTHER (OPPOSITE PARTIES).*

Criminal Procedure Code, section 195, clauses (b) and (c)—Sanction to prosecute—Power of appellate court to grant sanction—Appeal—Revision.

Held that the appellate Court, equally with the court of first instance, has power to grant sanction for a prosecution in respect of a document filed or evidence recorded in the suit.

Held, also, that a petition under section 195 (6) of the Code of Criminal Procedure seeking the cancelment of an order under section 195 (1) should be classed as a criminal appeal.

THE facts of this case were as follows :—

A suit was brought on a bond in the court of the Munsif of Basti. In the course of that suit, the appellants produced the original bond, which was the basis of the claim, with an endorsement on it purporting to be an endorsement of payment of the amount due upon the bond. Witnesses were examined to support the endorsement. The court of first instance held that the endorsement was a forgery. An appeal was preferred and was heard by the Additional Judge of Basti. He also was of opinion that the endorsement was forged and the evidence given in support of it was false. He affirmed the decree of the court of first instance. An appeal preferred to the High Court was dismissed under the provisions of order XLI, rule 11, of the Code of Civil Procedure. After these proceedings in the Civil Court, the plaintiffs to the suit made an application to the Additional Judge of Basti for sanction to prosecute Bhadesar Tiwari and others, and this application was granted. The persons against whom the sanction was thus given thereupon filed a petition in the High Court under section 195 (6) of the Code of Criminal Procedure.

Mr. A. H. C. Hamilton for the appellants.

The Hon'ble Pandit Moti Lal Nehru, for the respondents.

BANERJI, J.:—This is an appeal from an order of the Additional Judge of Basti granting sanction for the prosecution of the appellants for offences punishable under sections 471 and 193 of the Indian Penal Code. The appeal, being one from an order passed

* First Appeal No. 101 of 1912 from an order of E. E. P. Rose, Additional Judge of Gorakhpur, dated the 13th of June, 1912.

under section 195 of the Code of Criminal Procedure, should be deemed to be an appeal under that Code and thus a criminal appeal. It should have been registered as such, and I have heard it as a criminal appeal. It appears that a suit was brought on a bond in the court of the Munsif of Basti. In the course of that suit, the appellants produced the original bond, which was the basis of the claim, with an endorsement on it purporting to be an endorsement of payment of the amount due upon the bond. Witnesses were examined to support the endorsement. The court of first instance held that the endorsement was a forgery. An appeal was preferred and was heard by the Additional Judge of Basti. He also was of opinion that the endorsement was forged and the evidence given in support of it was false. He affirmed the decree of the court of first instance. An appeal preferred to this Court was, I am informed, dismissed under the provisions of order XLI, rule 11, of the Code of Civil Procedure. After these proceedings in the Civil Court, the plaintiffs to the suit made an application to the Additional Judge of Basti for sanction to prosecute the present appellants, and on this application the order giving sanction now complained of was made.

It is urged on behalf of the appellants that the Additional Judge of Basti had no jurisdiction to give the sanction asked for. In my opinion, this contention is untenable. The document which was found to be forged was given in evidence in the suit, which, in the stage of appeal, was pending in the court of the Additional Judge. It was thus given in evidence in a proceeding in the court of the Additional Judge. Similarly, the false evidence was given in a proceeding which was pending in the stage of appeal in the Additional Judge's court. Therefore, under clauses (b) and (c) of section 195 the learned Additional Judge was competent to sanction the prosecution of the appellants. It is true that the document was not produced in his court but it was given in evidence in the appeal which was pending in that court. That appeal was certainly a proceeding within the meaning of section 195. The Additional Judge had, therefore, jurisdiction to make the order appealed against and this appeal must fail. I accordingly dismiss it.

[But see *Mehdi Hasan v. Tota Ram*, I L. R., 15 All., 61,—F.D.]

Appeal dismissed.

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Before Mr Justice Tudball

OHHABRAJI KUNWAR AND OTHERS (DEFENDANTS) v. THE COURT OF
WARDS AND OTHERS (PLAINTIFFS.) *

1912,
November, 22.

Act No. VII of 1870 (*Court Fees Act*), section 7, clause IX—Decree on mortgage—Separate liabilities of distinct properties—Appeal in respect of distinct properties.

In a suit for sale on a mortgage a decree was passed declaring the separate liabilities of the different properties mortgaged. One of the defendants, whose property was held liable for specific sums of money, appealed. Held that the proper court fee payable on the memorandum of appeal was a fee calculated on the sum of money for which the defendant's property was held liable and not one calculated on the full amount of the decree.

THIS was a reference as to amount of court fee payable in this case on the memorandum of appeal. The following report of the office gives the material facts :—

"The plaintiff brought the suit out of which this appeal has arisen for recovery of Rs. 48,000 principal and interest on foot of a mortgage, dated the 28th of March, 1909, by enforcement of hypothecation lien. The original document, the basis of the suit, was not produced, as it could not be found, and the suit was brought on the basis of a copy of the bond.

"The suit was resisted on various grounds. However, the court below decreed the plaintiff's claim for Rs. 14,554-7-0 of the amount claimed together with *pendente lite* interest and proportionate costs and made the different properties liable for the rateable contribution. The property of mauza Bisoha was made liable to contribute Rs. 6,215-0-8, and of Tehra Man Rs. 1,012-11-5. These are the two properties with which we are concerned in this appeal.

"A decree for sale under order XXXIV, rule 4, was prepared. The decree awarded to the plaintiffs—

1. Rupees 14,554-7-0, principal and interest on foot of mortgage.
2. Rupees 11,220-14-0, *pendente lite* interest.
3. Rupees 622-9-6, proportionate costs.

Total, Rs. 26,397-14-6.

"Against the said decree the defendants abovenamed have preferred this appeal praying that the suit may be dismissed against them. The appeal is valued at Rs. 7,227-12-1 the

* Stamp Reference in First Appeal No. 13 of 1913.

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“In the face, however, of your order of 23rd February, 1912, order XVI, rule 33, of Civil Procedure Code, and taxing officer's ruling of 27th February, 1912, in S. A. No. 680 of 1911, where a part of the property was exempted in the decree, I do not agree.

“But the matter is one of general importance, and under section 5 of the Court Fees Act, I beg to refer the matter.”

The following decision was given by the Taxing Judge.

TUDBALL, J.:—This case is clearly distinguishable from the case in F. A. No. 197 of 1912. Here various properties have been held separately liable for separate sums of money. The present appellants are transferees of two parts of property which have been held liable for specific sums of money. If they succeed in their appeal it is only those properties which will be released from the operation of the decree and it is only these sums which the decree-holder will lose. The rest of the decree-holder's decree for various other sums and for various other properties will still hold good even if the appellants' appeal succeeds. The correct stamp on this appeal will be Rs. 365. I allow one fortnight to make good the deficiency.

Order accordingly.

1912,
vember, 25.

Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

BALDEO SINGH AND ANOTHER (PLAINTIFFS) v. KALKA PRASAD AND ANOTHER (DEFENDANTS).*

Act No. VII of 1870 (Court Fees Act), section 7, clause IX—Suit for sale on a mortgage—Court fee payable in appeal—Value of the subject matter—Amount declared due on date fixed for payment.

A decree for sale on a mortgage declared that on the date fixed for payment a specified sum would be due from the mortgagor, which included interest *pendente lite*.

Held that the court fee payable in appeal from such decree was to be assessed, not on the amount claimed in the suit but upon the amount with interest *pendente lite* found due by the court of first instance at the date fixed for payment.

THE question in this case was as to the amount upon which the court fee is payable on a memorandum of appeal against a decree awarding mortgage money with interest *pendente lite* to date

*Second Appeal No. 251 of 1912 from a decree of E. C. Allen, District Judge of Mainpuri, dated the 21st of December, 1911, reversing a decree of Pratap Singh, Additional Subordinate Judge of Etawah, dated the 10th of July, 1911.

of payment and declaring the amount so awarded. The following extract from the office report gives the material facts.

"The plaintiffs brought a suit for recovery of Rs. 1,191-11-6 on account of principal and interest calculated up to the date of suit on foot of a mortgage, dated the 7th December, 1885, executed by the ancestor of the defendants in favour of one of the plaintiffs and ancestors of the other plaintiffs.

"The court of first instance decreed the plaintiffs' claim with future interest till the expiry of six months from the date of decree at the bond rate and allowed no interest thereafter. A decree for sale under order XXXIV, rule 4, of the Code of Civil Procedure was accordingly drawn up which awarded to the plaintiffs a sum of Rs. 1,487-7-6 composed of the following items.

Rs. 1,191-11-6 amount claimed.

Rs. 129-12-0 *pendente lite* interest.

Rs. 166 costs of the suit.

Total Rs. 1,487-7-6.

"Against the said decree the defendants preferred an appeal to the lower appellate court valuing it at Rs. 1,191-11-6, the amount originally claimed by the plaintiffs, and paying a court fee of Rs. 85, as was paid by the plaintiffs on the plaint, and praying for a reversal of the decree of the court of first instance. The only ground taken in the memorandum of appeal was to the effect :—"It is fully proved from the evidence and probabilities that the consideration of the bond in suit has been paid off. The lower court is not right in its finding to the contrary." The lower appellate court allowed the appeal and dismissed the plaintiffs' suit. Hence the plaintiffs have preferred this second appeal.

"According to the long established practice of this Court I reported on 18th June, 1912, that the proper valuation of the appeal inclusive of *pendente lite* interest was Rs. 1,321-6-6 on which a court fee of Rs. 95 was payable, and that a court fee of Rs. 85 having been paid there was therefore a deficiency of Rs. 10 due by the defendants for the lower appellate court. The report was initialled by the learned vakil for the defendants respondents on the 20th June, 1912. He did not dispute the accuracy of the report within three weeks thereafter under rule 10,

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chapter III. The report was laid before the Hon'ble Judge receiving applications by order of the taxing officer. The Hon'ble Judge ordered the matter to be laid before the taxing officer who after referring the matter to the learned counsel, and consulting the Hon'ble Taxing Judge, to the best of my recollection, passed the following order on the 22nd July, 1912. 'It is not open to the learned vakil to dispute the accuracy of the office report now. He should have objected within three weeks of the 20th June, 1912. He is time-barred by rule 10, chapter III, High Court Rules.'

"On the matter coming on again before the Hon'ble Judge receiving applications on 6th August, 1912, the report was disputed a second time, and it was directed that the matter should be referred to the Bench hearing the appeal.

"In spite of the order of the taxing officer with reference to the Hon'ble Court's Rules quoted above, it is, I respectfully submit, expedient that the question of *pendente lite* interest should be decided once for all as there are several other similar objections raised by the learned vakils in other cases and our present-taxing officer has been pleased to order that they should be kept in abeyance pending orders of the Hon'ble Court in this particular case."

The taxing officer thereupon recorded as follows:—"It is important that a final decision should be reached on the questions raised by the taxing clerk. I am in entire agreement with the decisions of the previous taxing officers Messrs. Hose and Burkitt."

Babu Sital Prasad Ghose for the respondent.

The words "*the amount claimed*" in section 7 of the Court Fees Act mean, the specific amount claimed in the plaint, that is, the amount of principal and interest up to the date of the suit. There being no provision in the Act for paying court fees upon interest *pendente lite*, upon the analogy of the provision of section 11 of the Court Fees Act relating to mesne profits, it follows that the words "subject matter in dispute" in article 1, schedule 1 of the Act must mean either the whole or a portion of the "amount claimed" which was the only thing upon which the parties joined issue. In the present case the appellants in the lower

appellate court did not challenge the adjudication of the court of first instance with regard to interest *pendente lite* under section 34 of the Code of Civil Procedure. Therefore no question of such interest ever formed "the subject matter in dispute in appeal" to that court.

The Hon'ble Dr. *Sundar Lal*, for the appellant, was not called on to reply.

TUDBALL and MUHAMMAD RAFIQ, J. J.:—This suit was one for sale on the basis of a mortgage. The plaintiffs claimed a certain sum as principal with interest up to the date of institution together with *pendente lite* and future interest and in default of payment, asked for sale of the property. The main defence was that the debt had been satisfied. The first court held in favour of the plaintiffs and passed a decree, which is worded as follows:—

"This suit coming on this 10th of July 1911, it is hereby declared that the amount due to the plaintiffs on account of principal, interest and costs, calculated up to the 9th day of January, 1912, is Rs. 1,487-7-6 and it is decreed as follows. No order is passed as to future interest.

(1) That if the defendant pays into court the amount so declared due on or before the said 9th day of January, 1912, the plaintiff shall deliver up to the defendant or to such person as he appoints, all documents in his possession or power relating to the property and shall, if so required, retransfer the property to the defendant free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him.

(2) That, if such payment is not made on or before the said day of 9th January, 1912, the mortgaged property or a sufficient part thereof, be sold, and that the proceeds of the sale, &c."

From this decree the defendants appealed, and the sole ground of appeal was that it had been fully proved by evidence that the consideration of the bond had been paid off. They valued the appeal at Rs. 1,191-11-6, the amount of the principal, plus interest up to the date of the institution of the suit, as claimed by the plaintiffs, and they paid court fees accordingly. The lower appellate court held in their favour and dismissed the suit on a preliminary point. The plaintiffs have come up here on appeal. The taxing officer has reported that the defendants on their

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memorandum of appeal to the lower appellate court ought to have paid court fees on Rs. 1,321-7-6, the amount decreed against them by the court of first instance, which included interest subsequent to the date of institution. The court fee payable by the defendants in the lower appellate court is an *ad valorem* fee according to the amount or value of the subject matter in dispute in appeal. In view of the wording of the decree granted by the court of first instance it is quite clear that the amount or value of the subject matter in dispute is Rs. 1,321-7-6 (exclusive of costs) which the defendants had been ordered to pay on or before the 9th of January, 1912. It may be that the decree is not properly drawn up, but we cannot go behind the decree in deciding this matter. It is quite clear that as the decree stood it imposed on the defendants a liability to pay a sum of Rs. 1,321-7-6 on a fixed date and by the appeal they sought to set aside that liability. An argument has been strongly pressed upon us that in the circumstances of the present case the subject matter of the appeal is the same as the subject matter of the suit, *i.e.* the value of the plaintiff's claim. In our opinion, the decree being as it is, there is no force in this contention. The value of the subject matter of the appeal before the court below is as we have stated above. The defendants must make good the deficiency as reported by the taxing officer.

Order accordingly.

1912,
November, 27.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Banerji.

SAIYID ALI (PLAINTIFF) v. ALI JAN (PRINCIPAL DEFENDANT) AND
SAJJAD HUSAIN AND OTHERS (*Pro forma* DEFENDANTS) *

*Civil Procedure Code (1908), section 92 (i) — Procedure—Muhammadan law—
Waqf—Trust for a public purpose of a religious or charitable nature.*

Where a trust is a trust created for a public purpose of a religious or charitable nature (in this case a waqf under the Muhammadan law) no suit can be maintained for the removal of a duly appointed trustee, save in conformity with the provisions of section 92, sub-section (1), of the Code of Civil Procedure.

The facts of this case were as follows:—

One Sahib Ali erected a mosque and an *Imambara* at Jaunpur. After his death his wife Bikani Bibi became owner, and in 1856 she executed a deed of endowment with respect to this

* First Appeal No. 119 of 1911 from a decree of Keshab Deo, Subordinate Judge of Jaunpur, dated the 16th of January, 1911

property, and it was provided therein that Himayat Ali, the brother of her deceased husband, was to be the first mutawalli and after him his descendants, generation after generation, whoever among them was a fit and proper person. After Himayat Ali his son Mehdi Hasan became mutawalli. During his tenure of office a suit was brought by two persons seeking for the removal of Mehdi Husain on the ground that he had been guilty of breaches of trust. He was removed by the District Judge and filed an appeal before the High Court. During the pendency of that appeal he died. His counsel brought his son, the present plaintiff, on the record as his legal representative. Subsequently the appeal was dismissed. The plaintiff then instituted the present suit for a declaration that he was rightful mutawalli, as he was a descendant of Himayat Ali, and for the removal of the defendant, who had been appointed to that office by the District Judge when he removed Mehdi Husain. The lower court dismissed the suit on the grounds (1) that plaintiff had not obtained the sanction required by section 92 of the Code of Civil Procedure and that the court had no jurisdiction to hear the suit, (2) the question was *res judicata* and (3) the suit was time-barred. The plaintiff appealed to the High Court.

Dr. S. M. Sulaiman (with him Mr. S. A. Haidar, Maulvi Ghulam Muftaba and Maulvi Rahmat Ullah) for the appellant:—

Under the Muhammadan law the office was to devolve according to the provisions of the deed of endowment and the appointment of the defendant was bad. The suit was not one under section 92 of the Code of Civil Procedure at all. It was not brought by the plaintiff as a member of the Hindu community to which the waqf belonged. The plaintiff sought to enforce his private right to be appointed mutawalli. Waqfs under Mahamadan law were not necessarily public, they might be for the benefit of a family. The law of procedure could not override the provisions of Muhammadan law. In the former suit the question was not as to the qualification of the present plaintiff. Section 92 of the Code of Civil Procedure is not applicable to the public:—*Budree v. Mahim v. Chaudh. 1st January 1912*. The purpose of the section was to limit the number of suits brought on a representative basis. It was not intended to restrict the right of

(1) (1906) 11 B. 200, 201, 202.

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a private individual. Further, the District Judge was not competent to appoint the defendant. The section no doubt was wide enough to enable a court to appoint a Christian or a Hindu. It was unlikely that it would do so, but there was nothing to prevent its doing so. Besides, an *imambara* was not a public place: *Delrus Banoo Begum v. Kazeer Abdoor Rahman* (1) [BANERJI, J.—Referred to *Tajammul Husain v. Fazal Rasul* (2).]

Babu Satya Chandra Mukerji, for the respondent was not called upon.

RICHARDS, C. J., and BANERJI, J.:—The facts connected with this appeal are shortly as follows:—In the year 1856 one Musammat Bikani Bibi made a deed of waqf of certain property for the purpose of meeting the expenses of a certain mosque and *imambara*. The deed provided that she had appointed one Syed Himayat Ali, son-in-law of her husband's eldest brother, to be the nazir and mutawalli and that after him the fittest and ablest in the family, who should be a follower of the Shia sect, and a good and religious man, should be appointed, generation after generation, as nazir and mutawalli of the waqf. In the course of time the office of mutawalli was held by the plaintiff's father. During his incumbency a suit was instituted before the District Judge of Jaunpur alleging that he had been guilty of breaches of trust and seeking to remove him from being mutawalli. That suit was instituted under the provisions of section 539 of the Code of Civil Procedure of 1882, which was then in force. The result of the suit was that the learned District Judge removed the plaintiff's father from the office of trustee and appointed the defendant Syed Ali Jan Bahadur mutawalli in his place. An appeal was taken to this Court against the decree of the District Judge, but pending the hearing the plaintiff's father died. At the instance of the present plaintiff he was brought on to the record as the representative of his father, the appellant, but when the case came on for hearing it was dismissed, the appellant's counsel stating that he was unable for certain reasons to press the appeal.

The present suit has now been instituted claiming various reliefs, but there can be no question that in substance the plaintiff asks that the present mutawalli should be removed and that he

(1) (1875) 23 W. R., 453.

(2) (1907) 4 A. L. J., 774.

should be appointed mutawalli in his place, and that he should have a declaration that he is entitled to hold the trust property as mutawalli. The plaintiff claims that he fulfils the various conditions mentioned by the maker of the waqf as essential qualifications of the mutawalli.

The court below has dismissed the suit upon the ground that the suit is not maintainable. It was contended amongst other things that the trust was not a trust for a public purpose of a charitable or religious nature within the meaning of section 92. In our opinion, having regard to the terms of the waqf, and its description as given in the plaint itself, it is impossible to hold that the present trust was not trust created for public purposes of a charitable and religious nature, and we do not consider it necessary to say anything further upon this point.

As already stated the plaintiff himself had his name brought on the record as the representative of his deceased father, and the appeal was decided with him as a party. This perhaps would be almost sufficient ground for dismissing the present appeal. It is however urged that he could not legally have been brought on to the record because the cause of action did not survive. He was there, it is said, not as his father's son and heir, but as a person claiming to be, in the events which had happened, the person who was entitled to be appointed mutawalli. We therefore do not decide the appeal upon this ground. The important question is whether or not the present suit is maintainable. Bearing in mind that the trust was a trust created for a public purpose of a religious or charitable nature, it is clear that the defendant now is and was at the time of the institution of this suit in fact the duly appointed mutawalli of the trust. It is, therefore, obvious that the plaintiff seeks in the present suit to have him removed from his office and to have himself appointed mutawalli instead of the defendant. There is an express provision in section 92 of the present Code of Civil Procedure that no suit claiming relief of this nature can be instituted, save in conformity with the provisions of sub-section (1), that is to say, it can only be brought by two or more persons after sanction has been obtained in the manner provided by the section.

Appeal dismissed.

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SAHYID ALI

v.

ALI JAN.

1912,
November, 29.

REVISIONAL CRIMINAL.

Before Mr. Justice Tudball.

EMPEROR v. PHULEL.*

Act No. XLV of 1860 (Indian Penal Code), sections 182, 193—Complaint—Statement made to the Magistrate as head of the police and not as a magistrate.

P. appeared before a District Magistrate and made a statement in which he accused a certain police officer of having beaten him, demanded a bribe of him and locked him up in the police *hawalat*. He stated, however, that he did not wish to make a complaint, but only desired that an inquiry should be made. Nevertheless the Magistrate examined P. on oath, and subsequently, the charge having been found to be baseless, P. was convicted under sections 182 and 193 of the Indian Penal Code. *Held* that, inasmuch as P. had expressly stated that he did not wish to make a complaint, the statement must be taken to have been made to the District Magistrate, not as magistrate, but as head of the district police, and the conviction under section 193 of the Code could not be upheld.

The facts of the case are fully set forth in the judgement of the Court.

Babu *Lalit Mohan Banerji* (for Mr. W. Wallach), for the applicant.

The Assistant Government Advocate (Mr. R. Malcomson), for the Crown.

TUDBALL, J.:—The applicant Phulel went to the District Magistrate and made a statement before him that a certain police officer had beaten him, demanded a bribe from him and locked him in the police *hawalat*. He added that he did not wish to make a complaint, as it would not be possible to prove the complaint, but he wished the District Magistrate to make an inquiry so as to prevent the police officer behaving tyrannically towards him. In spite of the fact that he stated that he did not wish to make a complaint, the Magistrate made him take the oath and make a statement. Inquiry disclosed that the charge was groundless. Phulel was put on his trial under sections 211 and 182, Indian Penal Code. The Magistrate came to the conclusion that section 211 did not apply as the man distinctly refrained from instituting a complaint, but held that he was guilty of offences under sections 182 and 193, Indian Penal Code, and sentenced

* Criminal Revision No. 844 of 1912 from an order of R. O. Tute, Additional Sessions Judge of Meerut, dated the 11th October, 1912.

him to separate sentences for each of those offences. On appeal the learned Additional Judge held that the man had committed only one offence and that he should not be punished twice over for the same act. He held that the facts established an offence under section 193, Indian Penal Code. He maintained the conviction and sentence under that section and set aside the conviction and sentence under section 182. It is quite clear that when the applicant stated that he did not wish to institute criminal proceedings or make a complaint, the Magistrate was not moved *qua* Magistrate, but only as district head of the police. It was unnecessary and perhaps unlawful for the Magistrate under these circumstances to have forced the man to take an oath. As the Additional Judge has said, the man committed only one offence. He either committed an offence under section 182 or 211, Indian Penal Code. The conviction under section 193 cannot stand. I, therefore, alter the finding of the court below to a conviction under section 182, Indian Penal Code, and I maintain the sentence of three months' rigorous imprisonment which was originally imposed under that section.

Conviction altered.

Before Mr. Justice Tudball.

BANARSI DAS *v.* PARTAB SINGH.*

Criminal Procedure Code, section 125—Security to keep the peace—Procedure—Appeal—Jurisdiction.

1912,
November, 29.

A District Magistrate taking action under section 125 of the Code of Criminal Procedure cannot treat an application made under that section as an appeal and reverse the order of a first class Magistrate on the facts. If he considers the order to be wrong on the merits he can exercise his revisional powers and submit the record to the High Court: but the cancellation of bonds contemplated by section 125 can only be on the ground that the bonds are no longer necessary.

IN this case one Partab Singh was bound over by a magistrate of the first class to keep the peace. Partab Singh applied to the District Magistrate under section 125 of the Code of Criminal Procedure for cancellation of the bonds. The District Magistrate treated this application as an appeal; went into the evidence; passed an order accepting the appeal, and cancelled

* Criminal Revision No. 802 of 1912 from an order of Mahadeo Prasad, Officiating District Magistrate of Muzaffarnagar, dated the 19th of September, 1912.

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the bonds. Against this order Banarsi Das, who had applied to have Partab Singh bound over, applied in revision to the High Court, and his main contention was that the District Magistrate had no jurisdiction to treat the application under section 125 as an appeal and to consider the merits of the first class Magistrate's order.

Babu *Satya Chandra Mukerji* for the applicant.

Mr. *C. C. Dillon* for the opposite party.

TUDBALL, J. :—The facts of this case are briefly as follows:—The present applicant Banarsi Das applied to a magistrate of the first class asking him to bind over the opposite party to keep the peace. The Magistrate after recording all the evidence passed an order that the opposite party should furnish security for a certain period. The opposite party Partab Singh made an application to the District Magistrate which purported to be one under section 125 of the Code of Criminal Procedure. The grounds of this application were, however, directed against the order of the Magistrate binding him over to keep the peace. The application was treated as an appeal by the officiating District Magistrate, was registered as such and he went into the evidence on the record, and his order ended as follows:—"I accept the appeal and cancel the order of the lower court; all the bonds are cancelled." It is quite clear that the officiating District Magistrate who passed the order on the application treated the matter before him as an appeal and he came to the conclusion that the Magistrate's order was a bad one *ab initio*. An examination of the Code will show to the officiating District Magistrate that no appeal whatsoever lies to him from an order of this description by a first class magistrate. It was only in his power to examine the record, and if he found that an improper order had been passed, to submit the case to this Court for the exercise of its revisional power. His order is not an order which can be passed under section 125 of the Code. The cancellation of bonds contemplated in that section can be only on the ground that the bonds are no longer necessary. The Magistrate has decided the appeal without having any jurisdiction to do so. His order is void, and I therefore set it aside. The matter, however, is one concerning the peace of the district; and I think it advisable

in the circumstances of the case that the record should be placed before the present District Magistrate so that he may examine it himself and see whether or not it is any longer necessary to keep the opposite party under his bond. I direct accordingly.

Order set aside.

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APPELLATE CIVIL.

Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

BALDEO PRASAD AND ANOTHER (PLAINTIFFS) v. KUNWAR BAHADUR
AND ANOTHER (DEFENDANTS).*

1912,
December, 3.

Code of Civil Procedure (1908), order IX, rule 8—Appeal—Dismissal for non-appearance of appellant—Appellant present but unrepresented and unable to argue the appeal himself—Procedure.

On the date fixed for the hearing of an appeal one of the two appellants (the other being a woman) appeared before the court and applied for an adjournment to enable him to procure the attendance of his pleaders. He was called on to argue his appeal, but he said he had nothing to say, and thereupon the appeal was dismissed on the ground that it had not been supported. *Held* that in these circumstances the court was not justified in dismissing the appeal for want of prosecution, but was bound to consider the grounds of appeal and to decide the case on the merits.

IN this case the appellants, Baldeo Prasad and Musammat Ram Piari filed a partnership suit in the court of the Subordinate Judge of Fatehgarh. The suit was dismissed. They filed an appeal in the court of the District Judge. This appeal was adjourned several times either on the application of the parties or by the court *suo motu*. Finally it was fixed for the 20th of December, 1911. On that date the male appellant appeared and asked for two days' adjournment to procure the attendance of his pleaders. Thereupon the court called upon him to argue the case himself, and, on his confessing his inability to do so, proceeded to dismiss the appeal as not being supported. The appellants preferred the present appeal to the High Court.

Dr. Tej Bahadur Sapru and Babu Durga Charan Banerji for the appellants.

Babu Sarat Chandra Chaudhri (for Dr. Satish Chandra Banerji) for the respondents.

* Second Appeal No. 371 of 1912 from a decree of H. E. L. P. Dupernex District Judge of Farrukhabad, dated the 20th of December, 1911, confirming a decree of Gauri Shankar, Subordinate Judge of Fatehgarh, dated the 17th of March, 1911.

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TUDBALL and MUHAMMAD RAFIQ, J.J.:—This appeal arises out of the following circumstances. The plaintiff appellants Baldeo Prasad and Musammat Ram Piari filed a partnership suit in the Subordinate Judge's against the two respondents. The suit was dismissed. They filed an appeal, which was admitted on the 17th March, 1911, in the court of the District Judge. The date fixed for the hearing of the appeal, was the 6th of June. On the 31st of May on the application of the respondents the court fixed the 12th of July instead of the 6th of June. On that date the appeal was not heard, as the District Judge had no time by reason of other work. It was adjourned to the 28th of July. Again the court *suo motu* adjourned the appeal to the 28th of September. On that date at the appellant's request and with the consent of the respondents the appeal was adjourned to the 8th of November. On the 3rd of November the court of its own motion fixed the 6th of December for the hearing of the appeal. On this date the respondent's pleader was absent having gone to the Delhi Durbar. The case was adjourned for this reason to the 20th of December. So far the case had been adjourned only once at the request of the appellants and twice at the request of the respondents and three times for the convenience of the court. On the 20th of December the male appellant Baldeo Prasad appeared and applied for two days' adjournment to secure the attendance of his pleaders. One of them had gone to Agra and was expected back on the 22nd of December. The other had gone into the camp. There is no order on the application, but apparently it was rejected and the Judge called on the male appellant to argue the case. Not being a lawyer, the man was unable to do so, and fairly said that he had nothing to say. The learned Judge's judgement runs as follows:—"Respondents' pleader urges that as the appeal is not supported it should be dismissed. I agree." For this reason the District Judge dismissed the appeal without going into the merits. The female appellant Musammat Ram Piari subsequently filed an application for hearing on the ground that sufficient cause for her non-appearance could be established. This application was rejected. There are two appeals before us, one from the original decree and the other from the order rejecting the application of Musammat Ram Piari.

It is quite clear that the learned District Judge is wrong. To ask a non-legal appellant to argue his case is asking for what is practically impossible. The application for adjournment shows clearly and distinctly that he did not wish to drop his appeal. He wished to press it. The bare fact that he could not argue it did not justify the District Judge in dismissing it. It was necessary for him under the circumstances to consider the grounds of appeal and to decide the case on the merits. This he has not done. We therefore admit the appeal, set aside the decree of the District Judge and remand the case to his court with directions to re-admit the appeal to its original number in the register and to dispose of it on the merits. Costs will follow the event.

Appeal allowed and cause remanded.

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BAHADUR.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Banerji.
SABTA PRASAD AND ANOTHER (DEFENDANTS) v. DHARAM KIRTI SARAN
AND OTHERS (PLAINTIFFS).*

1912,
November, 18.

Arbitration—Award—Party to the suit not made party to the submission to arbitration—Party so omitted not a necessary party to the suit.

Held that an arbitration and an award made in the course of a suit would not be rendered invalid by the mere fact that a party whose name was on the record, but who was not a necessary party to the suit, was not made a party to the arbitration proceedings.

In a suit for partition of the property of a joint Hindu family between two branches thereof, the widow of one of the members of the family was made a party defendant. The subject matter of the suit was referred to arbitration, but to the submission the widow was not a party. An award was made, upon which a decree followed which was in accordance with the award. Against this decree the defendants appealed upon the ground that the widow was no party to the arbitration proceedings upon which the decree rested.

Mr. B. E. O'Conor and Maulvi Ghulam Mujtaba for the appellants.

Mr. A. H. C. Hamilton, The Hon'ble Pandit Madan Mohan Malaviya, Babu Jogindro Nath Chaudhri, Babu Satya Chandra Mukerji, Munshi Girdhari Lal Agarwala, Munshi Benode Behari and Pandit Rama Kant Malaviya, for the respondents.

*First Appeal No. 234 of 1910, from a decree of S. R. Daniels, District Judge of Moradabad, dated the 8th of May, 1909.

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RICHARDS, C. J., and BANERJI, J.:—This and the connected appeal No. 20 of 1911 arise out of two suits brought for partition of certain property which originally belonged to Sahu Radha Kishan.

The plaintiffs to the two suits are the descendants of Sahu Ganga Sahai and Sahu Gokal Prasad, two of the sons of Sahu Radha Kishan. One Musammat Janki was made a defendant to the suit: she is the widow of Sahu Shiam Saran, one of the sons of Sahu Ganga Sahai. All the parties to the two suits referred their disputes to arbitration, save and except Musammat Janki, who did not join in the submission. A decree was made by the arbitrator, who was the Subordinate Judge in whose court the suits were filed, and who was appointed arbitrator not only with the consent of the parties but also with the sanction of the Government. Decrees have been passed in both the suits in accordance with the award, and it is against these decrees that the two appeals before us have been preferred as also the appeal No. 21 of 1911 in which Musammat Janki is the appellant. The decree having been made in accordance with the award, a preliminary objection has been taken on behalf of the respondents that no appeal lies. If the award is legally valid, the decree being in accordance with the award no appeal can be preferred from the decree and the objection must prevail. We have therefore to determine whether the award is a legally valid award.

Mr. O'Connor, who appears for the appellants, challenges the validity of the award on the sole ground that Musammat Janki was not a party to the submission. If Musammat Janki was not a necessary party to the suit, the fact of her not joining in the submission would not in our opinion affect the validity of the award. As regards Musammat Janki the allegation of the plaintiff was that she was in possession of some villages in lieu of maintenance. Her statement was also to the same effect, and what she claimed was that her right of maintenance should not in any way be affected by the partition claimed in the two suits. It thus appears that all parties were agreed that she was not a necessary party having regard to the nature of her rights. Had the case gone to trial no question of her rights could have been determined in a partition suit. So that it is manifest that she was not, as the parties themselves also practically admitted, a

necessary party to the suit. The fact that she did not join in the submission did not therefore in our opinion vitiate the award. The decree having been passed in accordance with the award, no appeal lies and these two appeals must fail.

We accordingly dismiss this appeal with two sets of costs, one set to be obtained by Parsotam Saran respondent and the other by Sahu Dharam Kirti respondent. The objections under order XLI, rule 22, fail and are dismissed with costs.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Mr. Justice Tudball.

EMPEROR v. UDIT NARAIN DUBE AND OTHERS.*

Criminal Procedure Code, section 439—Revision—Powers of High Court—District Registrar.

A District Registrar is not a court subordinate to the High Court either on the civil, criminal or revenue side, and the High Court has no power to interfere with the order of the Registrar impounding a document and calling upon the applicants to show cause why they should not be prosecuted for forgery.

The facts of this case were as follows:—

The District Registrar of Mirzapur had before him an application with reference to a certain document for an order of compulsory registration of that document. The Sub-Registrar had refused to register it on the ground of denial. After making some inquiry the District Registrar refused to register it on the ground that he believed the document to be a forgery. He passed the order on the 27th of July, 1912. Immediately below the order he recorded the following order:—

"The deed in question is impounded. An inquiry will be held by me under section 476, Criminal Procedure Code, on my return from leave. The writer of the deed, the attesting witnesses, Khub Lal and Udit Narain, will be called on to show cause why they should not be prosecuted for forgery."

The parties against whom this order was made applied in revision to the High Court asking that it might be set aside.

Mr. D. R. Sawhny for the applicants.

The Assistant Government Advocate (Mr. R. Malcomson) for the Crown.

*Criminal Revision No. 857 of 1912 from an order of W. R. G. Moir, District Registrar of Mirzapore, dated the 27th of July, 1912.

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TUDBALL, J. :—This application has arisen out of the following facts :—

The District Registrar of Mirzapur had before him an application in reference to a certain document for an order of compulsory registration of that document. The Sub-Registrar had refused to register it on the ground of denial. After making some inquiry the District Registrar refused to register it on the ground that he believed the document to be a forgery. He passed the order on the 27th of July, 1912. Immediately below the order he recorded the following order :—

“The deed in question is impounded. An inquiry will be held by me under section 476, Criminal Procedure Code, on my return from leave. The writer of the deed, the attesting witnesses, Khub Lal and Udit Narain, will be called on to show cause why they should not be prosecuted for forgery.”

So far no action appears to have been taken by the District Registrar. Presumably the present application, though it does not say so, asks this Court on the criminal side to pass an order that the District Registrar should make no such inquiry. The District Registrar may or may not have power to pass such an order *qua* District Registrar. He may or may not have power as District Registrar to make the inquiry *qua* District Registrar or even as a private person. But with that I have nothing to do. I fail to see that I have power to forbid a District Registrar to make an inquiry into the matter if he so pleases. He is not a court subordinate to this Court either on the civil, criminal or revenue side, and it is a matter in which at this stage I see no ground for interfering even if I had power to do so. The application is rejected.

Application rejected.

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instance decreed the suit. On appeal the District Judge held that the suit was barred by *res judicata*, inasmuch as the present plaintiffs had taken no steps about their mortgage although they had been impleaded in Ram Saran's suit. The plaintiffs thereupon appealed to the High Court.

Munshi Jang Bahadur Lal, for the appellants :—

The suit is not barred by *res judicata*; for the matter now in issue, namely, the mortgage sued on, was not at all in issue in the previous suit. In that suit the existence of this mortgage was admitted in the plaint itself and was not denied by any party. There was no dispute about the matter, and it was, therefore, not in issue between the parties. So there was no need for the present plaintiffs to appear and prove their mortgage in that suit. The case is thus different from those relied on by the lower appellate court namely :—*Sri Gopal v. Pirthi Singh*, (1) *Gopal Lal v. Benarasi Pershad Chowdhry* (2) and *Nattu Krishnama Chariar v. Annangara Chariar* (3). In the first two cases the prior mortgage upon which the subsequent suit was brought was not set out or admitted by the plaintiffs in the previous suit; in fact the holder of that prior mortgage was impleaded not as such but in a different capacity. It was, therefore, his duty to disclose and prove his prior mortgage. The third case was that of a holder of two successive mortgages who had obtained a decree on foot of his first mortgage without disclosing the second, and then brought a suit upon the second mortgage. In the present case the plaintiff in the former suit not only disclosed and admitted the prior mortgage but actually offered to redeem it. Nothing, therefore, remained to be done by the prior mortgagees in that suit the omission to do which can operate as a bar under explanation IV to section 11 of the Code of Civil Procedure. I rely also on the following cases :—*Katchalai Mudali v. Kuppanna Mudali* (4) *Arunachala Reddi v. Perumal Reddi* (5) *Srinivasa Rao Sahab v. Yamunabhai Ammall* (6). The same remarks which have already been submitted with reference to the cases relied on by the lower appellate court apply to the two

(1) (1902) I.L.R., 24 All., 429.

(4) M.W.N., (1912), p. 41.

(2) (1904) I.L.R., 31 Cal., 428.

(5) (1910) 21 M.L.J., 635.

(3) (1907) I.L.R., 30 Mad., 353.

(6) (1905) I.L.R., 29 Mad., 84.

following cases :—*Gajadhar Tebi v. Bhagwanta* (1), *Mahabir Pershad Singh v. Prabhu Singh* (2). In the latter case the existence alone of the mortgage had been admitted and not its priority, which should, therefore, have been established.

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Maulvi Muhammad Ishaq, for the respondents :—

The suit is barred by *res judicata*. Although in Ram Saran's suit the existence of the prior mortgage was admitted by him and he offered to redeem it, yet the decree that was passed in that suit did not provide for the prior mortgage but ordered the sale free from any incumbrance. It was the duty of the prior mortgagees, who were made parties, to safeguard their interests by taking care to see that a proper decree, making due provision for their rights, was passed. They did not do so, nor did they get the decree amended or corrected. The result is that they have lost those rights and can not enforce them in a subsequent suit. *Vide* p. 437 of I. L. R., 24 All., cited already. This duty of theirs could not be dispensed with by reason merely of the fact that Ram Saran had admitted their mortgage. Moreover, the mortgagors, who were parties to Ram Saran's suit, did not admit the prior mortgage. It was the duty of the prior mortgagees, therefore, to prove their mortgage as against the mortgagors. In the case in I. L. R., 29 Mad., 84, the mortgagor, too, had admitted the prior mortgage. As regards the mortgagors or their representatives in interest, therefore, the prior mortgagees are precluded from setting up their mortgage. The cases relied on by the lower appellate court and the last two cases cited by the appellants support me.

Munshi Jang Bahadur Lal, in reply :—

The fact that the decree in the previous suit did not in terms reserve the rights of the prior mortgagees does not necessarily defeat those rights. *Vide* I. L. R., 29 Mad., 84, and M. W. N., 1912, p. 41, cited above.

KNOX and MUHAMMAD RAFIQ, J. J.:—It appears that one Ram Phal Man Tiwari executed a deed of mortgage in favour of Guptar Pande and Ajudhia Pande on the 20th of September, 1890. Ram Phal Man executed another mortgage subsequently in 1892 in respect of the same property in favour of Ram Saran. In 1897

(1) (1912) I.L.R., 34 All., 599.

(2) (1908) 9 C.L.J., 78.

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instance decreed the suit. On appeal the District Judge held that the suit was barred by *res judicata*, inasmuch as the present plaintiffs had taken no steps about their mortgage although they had been impleaded in Ram Saran's suit. The plaintiffs thereupon appealed to the High Court.

Munshi *Jang Bahadur Lal*, for the appellants :—

The suit is not barred by *res judicata*; for the matter now in issue, namely, the mortgage sued on, was not at all in issue in the previous suit. In that suit the existence of this mortgage was admitted in the plaint itself and was not denied by any party. There was no dispute about the matter, and it was, therefore, not in issue between the parties. So there was no need for the present plaintiffs to appear and prove their mortgage in that suit. The case is thus different from those relied on by the lower appellate court namely :—*Sri Gopal v. Pirthi Singh*, (1) *Gopal Lal v. Benarasi Pershad Chowdhry* (2) and *Nattu Krishnama Chariar v. Annangara Chariar* (3). In the first two cases the prior mortgage upon which the subsequent suit was brought was not set out or admitted by the plaintiffs in the previous suit; in fact the holder of that prior mortgage was impleaded not as such but in a different capacity. It was, therefore, his duty to disclose and prove his prior mortgage. The third case was that of a holder of two successive mortgages who had obtained a decree on foot of his first mortgage without disclosing the second, and then brought a suit upon the second mortgage. In the present case the plaintiff in the former suit not only disclosed and admitted the prior mortgage but actually offered to redeem it. Nothing, therefore, remained to be done by the prior mortgagees in that suit the omission to do which can operate as a bar under explanation IV to section 11 of the Code of Civil Procedure. I rely also on the following cases :—*Katchalai Mudali v. Kuppanna Mudali* (4) *Arunachala Reddi v. Perumal Reddi* (5) *Srinivasa Rao Saheb v. Yamunabhai Ammall* (6). The same remarks which have already been submitted with reference to the cases relied on by the lower appellate court apply to the two

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following cases :—*Gajadhar Teli v. Bhagwanta* (1), *Mahabir Pershad Singh v. Prabhu Singh* (2). In the latter case the existence alone of the mortgage had been admitted and not its priority, which should, therefore, have been established.

Maulvi Muhammad Ishaq, for the respondents :—

The suit is barred by *res judicata*. Although in Ram Saran's suit the existence of the prior mortgage was admitted by him and he offered to redeem it, yet the decree that was passed in that suit did not provide for the prior mortgage but ordered the sale free from any incumbrance. It was the duty of the prior mortgagees, who were made parties, to safeguard their interests by taking care to see that a proper decree, making due provision for their rights, was passed. They did not do so, nor did they get the decree amended or corrected. The result is that they have lost those rights and can not enforce them in a subsequent suit. *Vide* p. 437 of I. L. R., 24 All., cited already. This duty of theirs could not be dispensed with by reason merely of the fact that Ram Saran had admitted their mortgage. Moreover, the mortgagors, who were parties to Ram Saran's suit, did not admit the prior mortgage. It was the duty of the prior mortgagees, therefore, to prove their mortgage as against the mortgagors. In the case in I. L. R., 29 Mad., 84, the mortgagor, too, had admitted the prior mortgage. As regards the mortgagors or their representatives in interest, therefore, the prior mortgagees are precluded from setting up their mortgage. The cases relied on by the lower appellate court and the last two cases cited by the appellants support me.

Munshi Jang Bahadur Lal, in reply :—

The fact that the decree in the previous suit did not in terms reserve the rights of the prior mortgagees does not necessarily defeat those rights. *Vide* I. L. R., 29 Mad., 84, and M. W. N., 1912, p. 41, cited above.

KNOX and MUHAMMAD RAFIQ, J. J.:—It appears that one Ram Phal Man Tiwari executed a deed of mortgage in favour of Guptar Pande and Ajudhia Pande on the 20th of September, 1890. Ram Phal Man executed another mortgage subsequently in 1892 in respect of the same property in favour of Ram Saran. In 1897

(1) (1912) I.L.R., 34 All., 599.

(2) (1908) 9 C.L.J., 78.

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Ram Saran brought a suit on the basis of the mortgage of 1892 for the recovery of the mortgage money by sale of the hypothecated property. The suit was brought against Ram Phal Man mortgagor and against Ajudhia Pande and some of the legal representatives of Guptar Pande, who had died prior to the institution of the suit. Some other subsequent transferees were also impleaded in the case as defendants. Ram Saran prayed for the relief, among others, that he should be allowed to redeem the prior mortgage of 1890 in favour of Guptar Pande and Ajudhia Pande. The mortgagor and the prior mortgagees did not defend the suit or put in any appearance in court. The court trying the case of Ram Saran framed two issues only which related to the execution and registration of the mortgage deed of 1892 by Ram Phal Man. A decree was passed in favour of Ram Saran for the amount of the mortgage money, which was to be realized by sale of the hypothecated property. The decree did not declare any charge of the prior mortgage on the property to be sold in execution of the decree of Ram Saran. In execution of the latter decree Inayat-ullah Chaudhri became the purchaser of the property sold.

On the 2nd of August, 1910, Ajudhia Pande and the legal representatives of Guptar Pande deceased instituted a suit in the court of the Subordinate Judge of Gorakhpur to recover the mortgage money due on the mortgage of the 2nd of September, 1890. The claim was brought against the legal representatives of the original mortgagor, Inayat-ullah Chaudhri, the auction purchaser, and some subsequent transferees. The claim was resisted on the ground, among others, that it was barred by *res judicata*, inasmuch as the prior mortgagees being defendants in the suit of Ram Saran failed to prove the amount of their debt, in consequence of which the relief of Ram Saran regarding the redemption of the prior mortgage could not be allowed.

The court of first instance did not accept this defence and decreed the claim. On appeal the learned Additional Judge of Gorakhpur accepted the plea of *res judicata* and reversed the decree of the first court and dismissed the claim of the prior mortgagees. The learned Judge came to the conclusion that the plea of *res judicata* barred the claim of the plaintiffs appellants

on the authority of the cases:—*Sri Gopal v. Pirthi Singh* (1), *Nattu Krishnama Chariar v. Annangira Chariar* (2) and *Gopal Lal v. Benarasi Pershad Chowdhry* (3).

The case has been argued before us fully and at some length by the learned counsel for both sides and some additional authorities have been cited before us. The cases referred to by the learned Additional Judge and some other cases on the same point go to show that if a prior mortgagee is a defendant in the suit brought by the subsequent mortgagee in which the debt of the prior mortgagee *i.e.*, the debt prior to the debt in suit is not mentioned and the prior mortgagee omits to set up his claim on his prior mortgage, a subsequent suit would be barred under section 11 of the Code of Civil Procedure. These cases are no authority for holding that the plea of *res judicata* applies to the present case. In the case before us the debt of the prior mortgagee was admitted by Ram Saran in his plaint, and in fact he offered to redeem that debt. There was no occasion for the prior mortgagees to come to court and to bring to its notice their prior debt. In fact in two cases, namely, *Srinivasa Rao Saheb v. Yamunabhai Ammall* (4) and *Katchalai Mudali v. Kuppanna Mudali* (5), it has been held that under such circumstances the plea of *res judicata* does not apply. We are therefore of opinion that the claim of the plaintiffs appellants is not barred by section 11 of the Code of Civil Procedure. We accept the appeal, set aside the decree of the lower appellate court and remand the case to that court for determination according to law. The appellants will get their costs in this Court. Other costs will follow the event,

Appeal decreed and cause remanded.

(1) (1902) I.L.R., 24 All., 429.

(3) (1904) I.L.R., 31 Calo, 428.

(2) (1907) I.L.R., 30 Mad., 353.

(4) (1905) I.L.R., 29 Mad., 84.

(5) M.W.N. (1912), p. 41.

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December, 9.

*Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.*KALIAN AND OTHERS (DEPENDENTS) v. SADHO LAL AND OTHERS
(PLAINTIFFS).**Civil Procedure Code (1908), order XXXIV, rule 8—Execution of decree—Decree for sale on a mortgage conditioned on redemption of prior mortgages—Power of court to extend time for payment of redemption money.*

When a suit for sale by a subsequent mortgagee became by reason of the intervention of a prior mortgagee also a suit for redemption of the prior mortgage and a decree was passed accordingly, it was held that the court had power under order XXXIV, rule 8, to extend the time for payment of the sum found necessary to redeem the prior mortgage, the plaintiffs having through a *bona fide* mistake paid into court an insufficient amount.

The facts of this case were, briefly, as follows :—

The plaintiffs, who were subsequent mortgagees, brought a suit for sale upon their mortgage in which they impleaded certain prior mortgagees. The prior mortgagees appeared to answer the suit and claimed to be redeemed, and in the end a decree was passed in favour of the plaintiffs providing for redemption of the prior mortgages as a condition precedent to the sale of the mortgaged property by the plaintiffs. The plaintiffs paid into court within the time limited by the decree what they believed to be a sum sufficient to satisfy it, but, owing to a miscalculation, the sum was as a matter of fact not enough. The court, however, allowed time to the plaintiffs to make good the deficiency. Against this order the prior mortgagees appealed to the High Court.

Babu *Sarat Chandra Chaudhri* (with him Dr. *Satish Chandra Banerji*), for the appellants :—

The plaintiffs having failed to deposit the whole money within the time fixed by the decree their suit stood dismissed. Section 148 of the Code of Civil Procedure could not be called in aid as the court had no power to extend the time fixed in the decree for the deposit of the whole amount of mortgage money : *Het Singh v. Tika Ram* (1).

[TUDBALL, J.:—Section 148 of the Code certainly does not apply, but the proviso to order XXXIV, rule 8, would apply because this was a compound suit involving a sale of the property as well as redemption].

* First Appeal No. 129 of 1912, from a decree of *Shekhar Nath Banerji*, Second Additional Subordinate Judge of Agra, dated the 13th of February, 1912.

(1) (1912) I. L. R., 34 All., 388.

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In order to determine whether the rule in question would apply one has to look to the scope of the suit. The rule speaks of a suit for redemption, pure and simple, whereas the present suit was one for sale. The nature of the suit depends upon the relief asked and redemption was not the relief sought in this case. Therefore the rule would not apply. Even assuming that the rule applied, the court was not entitled to extend the time because no good cause was shown for such extension. The decree provided that the money was to be deposited to the credit of defendants 17, 19, 20 and 21. But the respondents deposited the money to the credit of defendant 17 and one Bidhi Chand, who at the date of the suit possessed no interest in the property. The deposit therefore was made in contravention of the express terms of the decree. The principle of the following case applies to the present case as showing that such a deposit is not valid: *Debendra Mohan v. Rani Sona Kunwar* (1).

The Hon'ble Munshi Gokul Prasad (with the Hon'ble Dr. Sundar Lal), for the respondents :—

No appeal lay from an order of the lower court granting an extension of time. Order XLIII, rule 1, clause (o) gives a right of appeal from an order *refusing* to extend the time for the payment of mortgage money. The latter order being expressly provided for as appealable, an order like the one now in question cannot form the subject-matter of an appeal, under the provisions of the Code. The mistake in the deposit was a *bond fide* one, because in the decree it was provided that the money should be deposited to the credit of defendant 17 and Bidhi Chand. The respondents were misled by that provision in the decree.

Babu Sarat Chandra Chaudhri, in reply :—

The order passed in the present case is a decree: *Rahima v. Nepal Rai* (2). According to the appellants' contention the court below had no jurisdiction to extend the time and consequently this Court can deal with the matter in the exercise of its revisional jurisdiction.

TUDBALL and MUHAMMAD RAFIQ J.J. :—This appeal arises out of the following circumstances. The respondents to this appeal brought a suit for sale on the basis of a mortgage. They impleaded

(1) (1904) I. L. R., 26 All., 291.

(2) (1892) I. L. R., 14 All., 520.

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certain persons as subsequent transferees. It appears that there were three prior mortgages, one in favour of Bidhi Chand and two in favour of Kalian. Bidhi Chand sold his rights to Kalian and the other three appellants before us. At the trial of the suit these four persons thought fit to stand upon their rights as prior mortgagees and claimed that the plaintiffs should redeem them before they sold the mortgaged property. The result of this was a compound decree in favour of the plaintiffs to the following effect. The court ordered the original mortgagors to pay up the plaintiffs' debt within three months. It then ordered that if they failed so to pay, the plaintiffs should pay within a further period of one month to the present appellants the sums due on the three prior mortgages, and conditional upon their so doing, the decree gave the plaintiffs power to consolidate the amounts due on all the mortgages and to put the property to sale for the full amount. It went on to say that if the plaintiffs failed to pay off the amounts due on the prior mortgages within the time allowed, the suit should stand dismissed. The original mortgagors failed to pay the money within the time allowed. Therefore the plaintiffs within a further time of one month deposited Rs. 3,690-0-0, stating in their application depositing the money that the amount is due to Bidhi Chand and Kalian. The money was really payable to Kalian and the other three appellants, who had acquired the rights of Bidhi Chand. The sum which ought to have been deposited by the decree-holders really amounted to something over Rs. 4,000-0-0. There had been an error in calculation and therefore after the period of one month Kalian and his co-appellants put in a petition of objection in which they pointed out that the amount deposited was not the full amount and therefore the plaintiffs' claim under the terms of the decree should be dismissed. They made no mention of the error in entering Bidhi Chand's name in the application. The decree-holders in reply pleaded that the deficiency in deposit was due to miscalculation. They also pointed out the error in entering Bidhi Chand's name and asked for further extension of time to make good the deficiency. The court allowed the application. Hence the present appeal.

The argument of the appellants is that the court had no power whatever to extend the time; that section 148 of the Code of Civil

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Procedure does not cover the case in which a time is fixed by the decree for the doing of some act mentioned in the decree, and that order XXXIV, rule 8, would not cover the case as the suit was not one for redemption. On behalf of the respondents it is contended that the order being an order extending time, no appeal whatsoever lies, as order XLIII, rule 1, clause (o), only grants appeals when the court refuses to extend time. The reply to this is two-fold, first that the order granting time is a decree within the meaning of section 47 of the Code, and secondly, that even if it be not a decree, the order passed is without jurisdiction and the court has power to set it aside in revision. In our opinion the order passed by the lower court was with jurisdiction and was justified by order XXXIV, rule 8. It is true that in its inception the suit was not a suit for redemption. It was a suit for sale, but directly the present appellants determined to stand upon their prior rights and demanded redemption, the suit became a compound suit and as a matter of fact the decree was both for sale and redemption, and so far as the decree between the present parties is concerned, it is clearly and simply a decree for redemption. In our opinion the proviso to rule 8 of order XXXIV, clearly applies and the lower court had power to pass the order. So far as the merits of the case are concerned we think the order of the court below is correct. The objection taken by the present appellant was simply as to the amount and the court below was satisfied that there was a *bond fide* mistake in calculation. As to the entry of Bidhi Chand's name the error was pointed out by the plaintiffs themselves. The lower court's order has done material justice. We see no reason to interfere and dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

SATYA SHANKAR GHOSHAL AND OTHERS (DECREE-HOLDERS) v MAHARAJ
NARAIN SHEOPURI AND OTHERS (JUDGEMENT-DEBTORS).*

1912,
December, 9.

*Execution of decree—Stay of execution of decree under appeal—Jurisdiction—
Procedure.*

Held that the court which passed a decree has no power to stay execution thereof whilst the decree is under appeal; neither has a court which has executed

* First Appeal No. 194 of 1912 from a decree of Srish Chandra Basu, Subordinate Judge of Benares, dated the 25th of April, 1912.

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its own decree awarding possession of immovable property power to restore to possession the party whom it has ejected.

The facts of this case were as follows :—

The plaintiffs obtained a decree against the defendants for possession of a house and for mesne profits on the 26th of January, 1912. In that decree the defendants were allowed one month's time within which to vacate the premises in dispute. The decree-holders applied for execution of their decree for possession, for costs and the mesne profits, on the 11th of April, 1912, and on the 23rd of April, 1912, obtained possession of the house through the court amin and got some movable property of the judgement-debtors attached. In the meantime the judgement-debtors had filed an appeal against the decree in the High Court on the 20th of April, 1912, and without applying for an order for the stay of execution in that Court put in an application on the 24th of April, 1912, in the court which passed the decree, praying for the restoration of possession to them pending the decision of the appeal in the High Court. On the 25th of April, 1912, the Subordinate Judge ordered restoration of possession to the judgement-debtor and accepted Rs. 2,500 as security from them. The decree-holders appealed.

Babu *Harendra Krishna Mukerji*, (with him Babu *Jogindro Nath Chaudhri* and Babu *Amulya Chandra Mitra*), for the appellants :—

The order of the lower court is illegal and without jurisdiction on several grounds. An appeal having been filed against the decree, the court which passed the decree had no power to stay execution or restore possession to the judgement-debtors after having once given possession to the decree-holders. The only court where such an application could then be made was the appellate court which had seisin of the suit and no other : *Chunni Lal v. Anant Ram* (1). Moreover, there can be an application for stay of execution, only where there is something to stay and not where a decree has been executed : *Dharram Singh v. Kishen Singh* (2). In the present case, possession having been given by the court to the decree-holders, there was nothing left to be done so far as that portion of the decree was concerned, and the execution court had become *functus officio*. The execution of the decree having been

(1) (1898) I. L. R., 25 Cal., 893.

(2) (1883) 12 C. L. R., 532.

completed even the appellate court could not grant a stay order, much less the court whose decree had been appealed against.

Babu *Sital Prasad Ghosh* (with Dr. *Satish Chandra Banerji* and Dr. *Surendro Nath Sen*), for the respondents :—

The lower court may have been technically wrong in superseding its own order passed on a previous occasion. But that court having taken security from the judgement-debtors this Court should not interfere. In any case justice will surely be done if this Court simply upsets the order of the court below which is under appeal without prejudice to the judgement-debtors now applying to obtain a stay order from this Court, which is seised of the matter as the appellate court.

TUDBALL and MUHAMMAD RAFIQ, J.J.:—The circumstances out of which this appeal has arisen are as follows:—The decree-holder, on the 26th of January, 1912, obtained a decree for possession of certain house property together with mesne profits and costs. Under the decree the judgement-debtors were directed to vacate the house within one month, i.e., the judgement-debtors were allowed one month's grace to remove their property. On 11th of April, 1912, the decree-holder applied to execute the decree. He asked to be put in possession of the house by ejectment of the judgement-debtors because the latter had not vacated it. They also asked for attachment and sale of movable property in order to recover the costs and mesne profits. On the 20th of April, 1912, the judgement-debtors filed an appeal against the original decree in this Court. No application was made at the time for stay of execution. On the 23rd of April, 1912, the Amin in the court below gave possession to the decree-holders and duly ejected the judgement-debtors. Movable property was also attached. On the 24th of April, 1912, the judgement-debtors filed an application stating that they had filed an appeal in the High Court and had also applied to that Court for stay of execution (which was incorrect), and they asked the court executing the decree to postpone the proceedings until the order of the High Court was received. On the 25th of April they made another application to the court below stating that they had filed the appeal, but the decree-holders had in execution dispossessed them and attached their property; that they had money ready as security; and they asked the court to release the property and restore them

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to possession. The court thereupon ordered the money to be deposited in the treasury as security, released the movable property and passed an order to the Amin to replace the judgement-debtors in possession. Accordingly the decree-holders were dispossessed and the judgement-debtors replaced in possession. It is against this order that the present appeal has been made. In the first place, on filing an appeal against the original decree, if the judgement-debtors wished to secure stay of execution they ought to have applied at once to this Court for that purpose. The lower court had no longer any power to stay execution after the appeal had been filed in this Court. In the next place, the decree having been executed in so far as possession of the house was concerned, that portion of the decree could no longer be stayed, it having been executed. The utmost that the lower court could have done on the 25th of April was to stay its hands and go no further. It had no power whatsoever to go backward, to drive the decree-holders out of possession and replace the judgement-debtors in possession. Its order was clearly passed without jurisdiction and was completely *ultra vires*. We accept the appeal, set aside the order of the court below and direct that the decree-holders be at once restored to the possession which will be theirs until the decree is set aside. The appellants will have their costs in this Court.

Appeal allowed.

APPELLATE CIVIL.

1912

December, 4.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Tudball.

KAMTA PRASAD (DEFENDANT) v. PANNA LAL (PLAINTIFF).*

Act (Local) No. II of 1901 (Agra Tenancy Act), sections 28, 29, 30 and 34—Expropriatory tenant—Mortgages from expropriatory tenant holding over after ejectment of mortgagor—Rent not fixed by agreement or by a decree of the Court—Right of zamindar to recover rent.

G. and H. were zamindars who owned some sir land and an occupancy holding. They executed a usufructuary mortgage of their sir land and occupancy holding in favour of K. and the predecessor of J. In execution of a money decree against G. and H. their zamindari rights were sold and P. purchased the same. Subsequently, in execution of a decree for arrears of rent, P. got G and H. ejected by the Revenue Court. Later on P. got K. and J. the mortgagees also ejected by the Revenue Court. P. then brought a suit against K. and J. for arrears of rent for the period between the ejectment of G. and H. and their own ejectment.

Held that P. was not entitled to recover the rent in regard to the period of time between the two ejectments as the rent had not been fixed either by agreement between the parties or by a decree of court.

THIS was an appeal under section 10 of the Letters Patent from a judgement of a single Judge of the Court. The facts of the case are stated in the judgement under appeal, which was as follows :—

"This and the connected appeal No. 343 of 1911 arise out of two suits brought by the respondent Panna Lal for arrears of rent under the following circumstances. Godha and Hamir Singh owned certain zamindari shares to which some sir lands appertained. They had also an occupancy holding in another share of which they were not proprietors. On the 10th of March, 1897, they executed a usufructuary mortgage of their sir and occupancy lands in favour of Kamta Prasad and Malkhan. The rights of Malkhan subsequently vested in Jhandu. In execution of a money decree against Godha and Hamir Singh their zamindari rights were sold by auction and were purchased by the plaintiff Panna Lal. On the 6th of September, 1906, Panna Lal sued Godha and Hamir Singh for arrears of rent of the sir land. Kamta Prasad and Jhandu were not parties to this suit. On the 15th of September, 1906, the claim of Panna Lal was decreed, the defendants Godha and Hamir Singh having filed a confession of judgement. On the 29th of November, 1906, these persons were ejected from the holding. Kamta Prasad, however, continued in possession, and accordingly, on the 25th of August, 1909, Panna Lal sued him and Jhandu in the Revenue Court for ejectment. They set up their mortgage, but the court of first instance held that they were tenants without rights of occupancy and ordered their ejectment. From the order of the court of first instance they appealed first to the Commissioner and afterwards to the District Judge. The

*Appeal No. 52 of 1912 under section 10 of the Letters Patent.

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letter held that the appeal was time-barred and dismissed it. From the decision of the District Judge, the application for revision, No. 4 of 1912, which has just now been decided, was filed. That application having been dismissed, the order of the District Judge has become final, and necessarily the order of ejectment made by the Assistant Collector on the 12th of March, 1910, has become final. In pursuance of this order Kamta Prasad and Jhandu have been ejected. On the 22nd of March, 1910, Panna Lal brought the two suits out of which this and the connected appeal arise for arrears of rent for the period between the date of the ejectment of Godha and Hamir Singh and that of the ejectment of Kamta Prasad and Jhandu. The claim was decreed by the court of first instance and the decision of that court was affirmed by the lower appellate Court. The first contention in this appeal is that the mortgage of the *sir* lands included a mortgage of the proprietary rights in those lands and that, therefore, the purchase by the plaintiff was subject to the mortgage in favour of Kamta Prasad and Multhan and the present suit for arrears of rent could not be brought against the appellant. As to this the terms of the mortgage deed of the 10th of March, 1897, clearly show that what was mortgaged was only the right to cultivate the *sir* lands and the lands held as an occupancy holding. The proprietary rights in the *sir* lands were not included in the mortgage. The mortgage deed in specific terms recites that it was a mortgage of the right to cultivate (*haq kasht*), so that it was a mortgage of the right to cultivate the *sir* lands. As after the sale of the zamindari, the *sir* lands ceased to be *sir*, the mortgage may be deemed to have attached to the exproprietary rights acquired by Godha and Hamir Singh on the sale of the zamindari right. Therefore Kamta Prasad and Jhandu became, as regards the *sir*, mortgagees of the exproprietary rights. For non-payment of arrears of rent the mortgagor having been ejected, their rights as mortgagees determined with the determination of the exproprietary tenancy. If the mortgagees wished to maintain the exproprietary rights, they ought to have paid the rent payable in respect of the exproprietary holding and they ought to have paid off the amount on the decree passed against the exproprietary tenants. There was no obligation on the landholder to sue the mortgagees. He properly sued his tenants and obtained a decree for rent and for non-payment of the amount of the decree he took out ejectment proceedings and thereby determined the tenancy, so that, as regards the *sir* lands, the appellant cannot contend that his rights as mortgagees still subsist. As I have said above, the appellant was ejected under the decree passed by the Assistant Collector on the 12th of March, 1910, but during the interval between the determination of the tenancy and the final ejectment of the defendant appellant he remained in possession. He was allowed to continue in possession, and, as the courts below find that his possession must be deemed to have been that of a tenant on the same rent on which Godha and Hamir Singh held the lands, it was not necessary to sue to assess him with rent. As pointed out above, upon the determination of the tenancy the mortgage also determined, and subsequently to such determination the mortgagees must be deemed, as held by the Revenue Court, to have been the plaintiff's tenants. As such tenants they were liable to pay rent, and it is reasonable to infer that their tenancy was one on the understanding that the rent which their mortgagors paid should be paid by them. In my opinion the view taken

by the court below is right and this appeal must fail. I, accordingly, dismiss it with costs."

Against this decision an appeal was preferred under section 10 of the Letters Patent.

Munshi *Girdhari Lal Agarwala*, for the appellant.

Munshi *Benode Behari*, for the respondent.

RICHARDS, C. J., and TUDBALL, J. :—The facts out of which this and the connected appeal No. 51 of 1912, have arisen are set out at length in our judgement in L. P. A. No. 49 of 1912. Those two appeals arise out of the two suits for rent therein mentioned.

We find it impossible to hold that the plaintiff respondent is entitled to recover the rent which he claims in regard to the period of time between the two ejectments. Admittedly no rent was fixed as between the present parties, either by agreement or by decree of court. Section 34 of the Tenancy Act (II of 1901, Local) clearly does not, and was never intended to, apply to the circumstances of the present case. It relates to the case of a person taking possession for the purpose of cultivating as a tenant without the consent of the landholder.

Here the present appellant defendant took possession with the full consent of the landholders Jodha and Hamir Singh in the year 1897. It is true that the latter by operation of law became the exproprietary tenants and have been ejected and that the appellant continued to occupy the land. Section 34 clearly does not apply.

Section 28 of the Act applies to the case of a sub-letting by a tenant before the commencement of the Act or a sub-letting subsequent to the Act in accordance with the provisions thereof. In the present case there was no sub-letting prior to the Act by a tenant and there has been no sub-letting since the Act came into force, in accordance with the provisions thereof. This section, therefore, does not apply.

Where the tenant has sub-let, otherwise than in accordance with the provisions of the Act, section 29 applies. It gives the landholder the option of enforcing or not the covenants between the tenant and sub-tenant. In the present case the plaintiff respondent is not seeking to enforce any such covenant; nor was there any sub-letting subsequent to the acquisition by Jodha

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and Hamir Singh of their exproprietary rights, unless we hold that mortgage operated as a sub-lease with effect from the date of the acquisition of exproprietary rights. Section 30 of the Act merely states that the interest of a sub-tenant ceases with the extinction of the interest of the tenant for whom he holds. The plaintiff does not in the present suit seek to enforce the terms of the contract between the appellant and Godba and Hamir. He puts them entirely on one side. Therefore we can find no provision in the law which enables him to enforce, as against the appellant, the contract between himself and the exproprietary tenants.

Unless he is entitled to recover this rent by some provision of the law, in the absence of a contract between the parties, or a decree of court, he is not entitled to recover it.

For these reasons we must hold that the suit fails. We allow the appeal. The suit will stand dismissed with costs in all courts.

Appeal allowed.

Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

BHAGWATI PRASAD (PLAINTIFF) v. BHAGWATI PRASAD AND
OTHERS (DEFENDANTS)*.

1912

December, 10.

Act (Local) No. III of 1901 (United Provinces Land Revenue Act), sections 111, 112, 233 (k)—Partition—Hindu law—Joint Hindu family—Minor—No necessity for minor to be specially represented in partition proceedings.

Where a partition of the property of a joint Hindu family in which one of the members was a minor was found to have been properly carried out with due regard to the interests of the minor, it was held to be no ground for upsetting the partition, were such a course possible having regard to section 233 (k) of the United Provinces Land Revenue Act, 1901, that the minor was not represented in the partition proceedings by a formally appointed guardian. In such circumstances a minor member of the family is suitably represented by the managing member or members.

THIS was a suit for a declaration that the plaintiff was not bound by certain partition proceedings. The facts are fully set forth in the judgement. Shortly they were as follows :—

The proceedings were instituted by the defendants against the plaintiff and other members of his family. The plaintiff was a minor when those proceedings were instituted. No guardian was formally appointed to represent the plaintiff, but the major

* Second Appeal No. 626 of 1911 from a decree of F. D. Simpson, District Judge of Gorakhpur, dated the 1st of May, 1911, reversing a decree of Harbandhan Lal, Additional Subordinate Judge of Gorakhpur, dated the 26th of November, 1910.

members of the family acting for themselves and the plaintiff arrived at an arrangement with the opposite party in accordance with which the partition proceedings were carried out. The plaintiff brought this suit to set aside these proceedings. The court of first instance decreed the suit, but the lower appellate court reversed the decree. The plaintiff appealed to the High Court.

Dr. *Tej Bahadur Sapru*, for the appellant:—

There was no formal appointment of a guardian for the appellant in the partition proceedings. Therefore the appellant cannot be held bound by the partition carried out by the Revenue Court. The minor might have been a member of a joint Hindu family, the managing member of which was made a party to the proceeding, but that did not make an express provision of the law, namely, that a minor must be represented by a *formally* appointed guardian in order to bind him, unnecessary and superfluous. As regards the question of the Civil Court's authority to question a partition carried out by a Revenue Court, it should be noted that what was challenged in this case was not the validity of the partition proceedings of the Revenue Court but the mode of distribution of the mahals which involved a question of proprietary title and as such was maintainable in a Civil Court.

The Hon'ble Dr. *Sundar Lal* (with whom Mr. *E. A. Howard*), for the respondents:—

There may have been some irregularity in not appointing a guardian to the minor in the Revenue Court during the course of the partition proceedings, but there are several circumstances in the present case which bind the minor, in spite of that technical defect. The minor was a member of a joint Hindu family, all the members of which, including the plaintiff appellant, were made parties to the partition proceedings. The interest of the minor was identical with that of the other members; no fraud was practised, nor was there even any allegation of it by the plaintiff, and the interest of the minor did not in any way suffer in carrying out the partition. Under these circumstances there is no doubt that the minor was bound by the partition proceedings. Moreover, a suit to set aside a partition proceeding is not a suit in which a question of proprietary title is raised and does not fall under the provisions of either section 41 or section 112 of the

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Act and therefore section 233 (k) of that Act will bar such a suit.

Dr. *Tej Bahadur Sapru* was heard in reply.

TUDBALL and MUHAMMAD RAFIQ J.J. :—The facts out of which this appeal has arisen are as follows :—

The plaintiff, Bhagwati Prasad, together with his half brothers, Jokhu and Lachman, and his uncles Umrao and Ram Nath, and the widow of his deceased uncle Nandan, constituted a joint Hindu family. The family owned a share in mauza Dibaria Buzurg. The defendants, first party, Bhagwati Prasad No. II, minor, &c., were also co-sharers, and so also were the defendants, third party. These three groups of co-sharers cultivated their separate *sir* lands. The defendants, second party, are the plaintiffs' half brothers and uncles and aunt. The first set of defendants applied to the Collector under the Land Revenue Act for partition of their share into a separate mahal. The plaintiff was then a minor, and, as the names of all the members of the family were recorded in the khewat, his name was also recorded therein under the guardianship of his half brother, Lachman. There was no objection to the partition, nor is it denied even now that the parties to the partition were the owners in possession of their recorded shares. In the *wajib-ul-arz* there was recorded the express wish of the then co-sharers that at the time of partition, if it occurred in the future, the various co-sharers should be maintained in possession of the various lands which they then held. This is also in accordance with the provisions of the Land Revenue Act and it is a rule regularly followed in all partitions unless it is not possible to divide the mahal fairly and justly between the co-sharers, in which case the rule has perforce to be broken. Provision is made for this in the Act. In the partition proceeding there was an entry to the effect that the rule was to be followed. But apparently the defendants, first party, and the plaintiffs' brothers and uncles came to an agreement out of court and threw their *sir* lands into the hotchpot and the whole mahal was divided into shares. Fraud, collusion and dishonesty were alleged by the plaintiff in the present suit, against both his own relations and the first set of defendants, but he has utterly failed to prove these allegations, and the courts below have held against him on this point and it is not now put forward. It may

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therefore be taken for granted that the partition was justly and fairly carried out, and it was completed and sanctioned by the Collector on the 30th of September, 1908. The plaintiff at that time, though a minor, was not far from his majority, for he instituted the present suit on 27th May, 1910, as being major and of full age. He attained his majority in fact on November 25th, 1908 (*vide* his plaint). In the course of the partition many plots of land which he and his family cultivated as *sir*, were placed in the mahal of the first defendants. In the course of the partition case the Revenue Court omitted to make any formal appointment of a guardian *ad litem* for the present plaintiff. The application for partition was made on the 19th of February, 1908. On the 2nd of April a petition was filed by the plaintiff's brothers and uncles to the effect that they had no objection. It was not signed by Lachman, but by Jokhu on his behalf and the plaintiff's name was omitted. On the 2nd of July, 1908, the agreement mentioned above was written and it was filed on the 3rd of July, 1908, and with it a mukhtarnamah signed with Lachman's name. Plaintiff's name was entered in this application (or agreement). Jokhu again appears to have signed for Lachman. On the same day Jokhu filed an application that the plaintiff was a co-sharer and his share should be entered in Lachman's patti. His name was then entered in all papers from which it had been omitted. After the partition lots had been drawn up the family apparently concluded that it was a mistake not to retain their *sir* plots in their own shares. Accordingly Umrao and Ramnath, the two uncles, and Jokhu filed a petition of objection on the 31st of August, 1908. This was disallowed. Thereupon Lachman and others appealed to the Commissioner and this was also disallowed. The partition was completed.

The present suit was brought by the plaintiff alleging—

(1) Fraud and dishonesty on the part of his own brothers and uncles with intent to ruin his interests.

(2) That though Lachman was nominated as a guardian *ad litem* the court did not formally appoint him.

(3) That he was unfit to act as guardian and not entitled to the post as the minor's mother was alive.

(4) That he did not, as a matter of fact, look after the minor's interests.

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(5) That the Revenue Court did not grant any sanction to the agreement in regard to the mode of partition of the lands and that the said partition had been detrimental to the minor's interests.

On these allegations he asked for a declaration that the partition was unlawful and void and that defendants, first party, had no right or share in the five anna, four pie share of the family and those plots of land which had been the *sir* and *khudkasht* of plaintiffs' family and which had been allotted to them (the defendants). In the alternative he asked to be put into possession of those specific plots. The court of first instance held that the plaintiff was entitled to maintain the suit in respect only to his own share and granted a declaration that the partition was not binding on him and that the defendants, first party, were not entitled to the possession of the plots (of *sir* and *khudkasht*) in dispute belonging to the plaintiff's share. It was further declared that the decree did not affect the rights of the defendants, first party, regarding so much of the lands in dispute as appertained to the share of the defendant, second party. This decree clearly was one which, if it were to have any effect, would really upset the whole partition. It did not even make the plaintiff restore to the other party those lands which he received in lieu of his *sir* and *khudkasht* plots in dispute. On appeal the District Judge dismissed the suit *in toto*. He was of opinion that the managing members of the joint family were parties to the partition, and as there was no fraud or collusion proved all members of the family were bound by it and could not go behind it, and that the present suit was one brought at their instigation to get behind the partition and to attain the object which they failed to attain in the Revenue Court by their objections and appeal. The plaintiff appeals.

In the beginning we have to point out—

- (1) that no fraud has been established;
- (2) that it has nowhere been shown that the partition has been made to the detriment of the plaintiff or that he has not received his fair share of the parent mahal;
- (3) that his objection to it is directed not to a question of proprietary title but merely to the mode in which the lands have been distributed;

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opportunity of taking the matter of the partition on review to the Board of Revenue, the highest court of appeal and revision on the revenue side, so that any injustice might, if it existed, be set right. The Board has rejected his application and nothing has been shown to us which goes to prove that the partition was other than just and equitable.

In the circumstances, therefore, we hold that the suit was properly dismissed. We dismiss the appeal with costs.

Appeal dismissed.

REVISIONAL CIVIL.

Before Mr. Justice Tudball.

1912

December, 13.

RALLI BROTHERS (APPLICANTS) v. AMBIKA PRASAD (OPPOSITE PARTY).
Master and servant—Clerk engaged on a monthly salary—Relinquishment of employment without consent of master—Clerk not entitled to salary for broken portion of month in which he left his service.

Held that an office clerk engaged on a monthly salary is not entitled to any salary for the broken portion of a month in the course of which he leaves his service without the consent of his employer. *Ridgeway v. Hungerford Market Company* (1), *Dhumeo Behara v. Sevenoaks* (2) and *Ramji Manor v. Little* (3) referred to.

ONE Ambika Prasad was a clerk in the service of Messrs. Ralli Brothers on a monthly salary of Rs. 50. He left his service in the middle of a month without the consent of his employers and thereafter sued the firm to recover his salary for the broken portion of the month in which he left. The court of Small Causes at Cawnpore gave him a decree. Messrs. Ralli Brothers thereupon applied in revision to the High Court.

Mr. A. H.-C. Hamilton, for the applicants.

The opposite party was not represented.

TUDBALL, J:—The opposite party to this application was a clerk in the employment of Ralli Brothers on a monthly salary of Rs. 50 per month. He left his service in the middle of the month without the consent of his employers, and he then brought the suit out of which this application has arisen to recover the salary for the broken portion of the month. He gave no previous

*Civil Revision No. 112 of 1912.

(1) (1835) 3 A. and E., 171. (2) (1886) I. L. R., 13 Cal., 80.

(3) (1873) 10 Bom. H.C. Rep., 57.

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APPELLATE CIVIL.

December, 16.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Tudball.
 ATMA RAM, AND OTHERS (PLAINTIFFS) v. UGRA SEN AND OTHERS
 (DEFENDANTS).*

Act No. XVI of 1908 (Indian Registration Act), section 32—Registration—"Presentation"—Physical delivery of document by person not authorized to "present," but executant present and assenting whilst registration was going on

Where it is shown that, prior to the registration of the document by the duly authorized official, a person who is competent to present the document for registration was present before that official assenting to the registration, the requirements of the Registration Act are sufficiently complied with.

Mujib-un-nissa v. Abdur Rahim (1) and Karta Kishan v. Har Narain (2) referred to.

IN this case the plaintiffs' suit had been dismissed by the court of first instance upon the ground that the documents upon which it was based had not been registered in accordance with the provisions of the Indian Registration Act, 1908. The facts relating to the registration of the documents in question were these. The documents were brought to the Sub-Registrar by persons who were not duly authorized to present them for registration. But on the same date, and possibly at the same time, the mortgagor himself, who was a person entitled to present them for registration, came to the Sub-Registrar's office and admitted execution, and thereupon the documents were in fact registered. The plaintiffs appealed to the High Court.

The Hon'ble Pandit *Moti Lal Nehru*, for the appellants.

The Hon'ble Dr. *Sundar Lal*, for the respondents.

RICHARDS, C. J. :—The only question which has been argued here is whether the documents, the foundation of the present suit, were or were not duly registered. It appears that the documents were brought to the Sub-Registrar by persons who were not duly authorized to present the documents for registration in the manner prescribed by the Registration Act. It, however, also appears that on the same date, if not at the same time, the mortgagor,

* Second Appeal No. 1357 of 1911 from a decree of W. D. Burkitt, District Judge of Saharanpur, dated the 19th of July, 1911, confirming a decree of Muhammad Shafi, Subordinate Judge of Saharanpur, dated the 29th of September, 1910.

(1) (1900) I. L. R., 23 All., 233.

(2) (1912) I. L. R., 35 All., 72.

being a person who was entitled to present the documents for registration, came to the Sub-Registrar's office and admitted execution, and that thereupon the documents were in fact registered. The question is whether or not this amounts to a good presentation within the meaning of the Registration Act. There cannot be the least doubt that the mortgagor was present as an assenting party to the documents being registered. The question involved was very fully argued before a Full Bench of this Court in a recent case. At the conclusion of the arguments, however, the case turned on another point and no decision was actually given. Practically speaking precisely the same question arose in *Karta Kishan v. Har Narain* (1), and a Bench of this Court decided on the 15th day of November, 1912, that registration under circumstances very similar to those of the present case was a good registration. In my opinion where it is shown that prior to the registration of the document by the duly authorized official, a person who was competent to present the document for registration was present before the Sub-Registrar assenting to the registration the Registration Act is sufficiently complied with. I have nothing to add to the views which I expressed in the decision to which I have referred.

TUDBALL, J.—I fully concur. It seems to me quite clear that the present case comes well within the principle which is set forth in the decision of their Lordships of the Privy Council in *Mujib-un-nissa v. Abdur Rahim* (2). Their Lordships therein observed:—"When the terms of section 32 are considered with due regard to the nature of registration of deeds, it is clear that the power and jurisdiction of the Registrar only come into play when he is invoked by some person having a direct relation to the deed." In the present case it is perfectly clear that, prior to the registration, the mortgagor, who was a person having a direct relation to the deed, did come forward and invoke the Registrar to exercise his power and jurisdiction, and this action was tantamount to a presentation for registration. I do not think that there is any magic in the mere physical handing over of the document.

BY THE COURT.—The order of the Court is that we allow the appeal, set aside the decrees of the two courts below and remand

(1) (1912) 1 L. R., 35 All., 72. (2) (1900) 1 L. R., 23 All., 233.

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the case to the court of first instance, through the lower appellate court, with directions to re-admit the suit under its original number in the file and proceed to hear and determine the case on its merits. Costs here and in the courts below will be costs in the cause.

Appeal decreed and cause remanded.

REVISIONAL CRIMINAL.

1913

January, 2.

Before Mr. Justice Tudball.

EMPEROR v. RAMA AND OTHERS. *

Act No. XLV of 1850 (Indian Penal Code), section 188—Order duly promulgated by public servant—Order forbidding persons to enter railway premises except for travelling.

Held that the public have a right to enter upon railway premises for many purposes other than travelling, and an order forbidding persons to enter a railway station except for *bona fide* purposes of travelling would be an illegal order.

In the particular instance, however, it did not appear that the order in question was issued by any authority which, supposing it to be otherwise legal, would have had power to issue it.

THE facts of this case were as follows :—

An order was published at Bindhachal railway station on the East Indian Railway forbidding *pandas* to go on the railway station except for *bona fide* purposes of travelling. Certain *pandas* who were found at the station soliciting pilgrims were accordingly charged with an offence under section 188 of the Indian Penal Code for disobedience to this order. They were convicted and sentenced to certain fines.

The Sessions Judge of Mirzapur acting under section 438 of the Code of Criminal Procedure thereupon referred the case to the High Court with the recommendation that the convictions and sentences should be set aside.

Neither the accused nor the Crown were represented.

TUDBALL, J.—Certain persons have been convicted by a Magistrate of an offence under section 188, Indian Penal Code, and have been sentenced to pay certain fines. The case has been referred to this Court by the Sessions Judge with the recommendation that the

* Criminal Reference No. 1003 of 1912.

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convictions and sentences be set aside and the fines refunded. As far as it is possible to do so from the record I gather the facts to be more or less as follows :—Some officer or other has published an order forbidding the accused, who are *pandas*, from going on the railway station at Bindhachal except for *bona fide* purposes of travelling. The record does not show by whom that order was issued and whether he had power to issue it. There is nothing to show that it was issued to the accused personally: apparently it was generally proclaimed. The record shows that the accused went on to the platform and importuned certain pilgrims. The Magistrate has therefore held them guilty under section 188, Indian Penal Code. That section runs as follows :—

“Whoever knowing that, by an order promulgated by a public servant lawfully empowered to promulgate such order, he is directed to abstain from a certain act, or to take certain order with certain property in his possession or under his management, disobeys such direction, shall, if such disobedience causes or tends to cause obstruction, annoyance or injury, to any person lawfully employed, be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both.”

There is nothing on the record to show that any order was promulgated by a public servant lawfully empowered to promulgate such order. It is true that the case was tried summarily, and in a summary trial the evidence need not be recorded, but the record shows that no evidence whatsoever was taken to prove the order that was promulgated or to prove that the person who issued the order was authorized to issue it. Moreover, if the order be, as described in the opening clause of the judgement, forbidding persons to enter railway quarters except for *bona fide* purposes of travelling, such an order is far from being legal. The public have a right to go to the railway premises for many other purposes than travelling and orders forbidding persons to enter railway premises except for travelling purposes could not legally be issued. It would indeed defeat many other purposes for which railways are intended. For this reason the order must be set aside.

There are other grounds, as pointed out by the learned Sessions Judge, on which it is open to this Court to set aside these convictions, but I do not think it necessary to discuss them. It is incumbent on the prosecution to prove the necessary ingredients which go to constitute an offence. Unless the proof is before the court it cannot be said that the offence has been established.

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I therefore set aside the convictions and sentences and direct that the fines if paid be refunded.

Convictions set aside.

APPELLATE CIVIL.

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January, 8.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Banerji.
NARAIN DEI (PLAINTIFF) v. DURGA DEI AND ANOTHER (DEFENDANTS).^{*}
Civil Procedure Code (1908), section 65—Execution of decree—Benami purchase—Claim against certified purchaser, but not by representative of the real purchaser.

The widow of one Bhola Nath purchased a house at a civil court auction sale in the name of her son-in-law Baldeo and incorporated it into another house left by her husband who had died sonless. On her death one of her daughters claimed the house as an heir of her deceased father. The son-in-law in whose name the house was purchased raised the plea that he was the certified auction purchaser and the suit was barred by section 66 of the Code of Civil Procedure. *Held* that as the plaintiff did not claim through the widow, but through the widow's husband, her father, the suit did not come within the purview of section 66 of the Code. *Ram Narain v. Mohanian* (1) distinguished.

THIS was an appeal under section 10 of the Letters Patent from a judgement of a single Judge of the Court. The facts of the case are fully set out in the judgement under appeal, which was as follows:—

"In order to understand this appeal, it will be better in the beginning to set out, that one Bhola Nath had a wife, named Musammat Sundar Dei. Of these two, were born four ladies, Musammat Narain Dei, Musammat Durga Dei, Musammat Uttam and Musammat Piari. Bhola Nath died leaving his widow, and these four ladies him surviving. Musammat Sundar Dei is now dead, and the dispute relates to property which is said to be the property of Musammat Sundar Dei. It will be well to note also, that the lady, Musammat Durga Dei, married one Baldeo. In this appeal the parties are Musammat Narain Dei, who was the plaintiff in the court of first instance, Musammat Durga Dei and her husband Baldeo. The property with which this appeal is concerned, is a house situate in muhalla Mandi Said Khan in the city of Agra. This house was put up to sale by the Civil Court at Agra. It was purchased—so the sale certificate sets out—by Baldeo. The sale certificate shows that it was sold subject to a lien of Rs. 119-14-0, arising out of a deed, dated the 3rd June, 1891, of which one Ganga Prasad was the holder. Musammat Narain Dei came into court and asked for possession of this property as being part of the property left by Musammat Sundar Dei. After setting out the pedigree, she alleges that Musammat Sundar Dei, her mother, got possession of all the property left by Bhola Nath, and that in her life-time she purchased the house in dispute, adjoining the house left by

^{*} Appeal No. 87 of 1912 under section 10 of the Letters Patent.

(1) (1908) I. L. R., 28 All., 82.

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Bhola Nath, and included it in one house. The purchase was made, she says, by Musammat Sundar Dei, out of the money which she had inherited, but she adds that the name of Baldeo was entered fictitiously. According to her Musammat Sundar Dei always remained in possession of the property. She puts the cause of action as arising on the 10th of March, 1907. In the written statement the defendants distinctly denied that the house in dispute was purchased by Musammat Sundar Dei; they deny that she was the owner of it, they specifically deny that the property was purchased fictitiously in the name of Baldeo, and that Musammat Sundar Dei was ever in adverse possession of it. The court of first instance holding that Musammat Sundar Dei was in the receipt and enjoyment of the rent of the house in dispute up to the date of her death, and that Baldeo had no right after her death—the date of wrongful possession as against the legal heirs of Musammat Sundar Dei—decreed the plaintiff's claim for possession of a one-third share in the house in dispute, and directed that it should be partitioned. In appeal, the lower appellate Court held that section 66 of the Code of Civil Procedure of 1908 barred this suit. It held that Baldeo was the purchaser certified by the court, and in consequence decreed the appeal which had been brought by Baldeo and Durga Dei and modified the decree of the court of first instance, directing that the suit for possession by partition of the house in Mandi Said Khan be dismissed together with mesne profits for the same. Musammat Narain Dei comes here in appeal and contends, first that section 66 of Act V of 1908 has no application; secondly, that the plea was for the first time raised in appeal, and the lower appellate Court should not have entertained it. There is a third plea by which it is contended that the whole of the house in muhalla Mandi Said Khan was not purchased by a sale of the Civil Court, that only one-third of it was so purchased and the remaining two-thirds were the result of a private purchase. The fourth plea raised is one regarding the mesne profits of the house.

“To take plea No. 2 first, the question raised is a question of law. The shadow of it had certainly been cast in the pleadings and I think, the lower appellate Court was fully justified in considering the plea. There remains the question how far section 66 of the Civil Procedure Code of 1908, is or is not, a bar to the suit as brought. The contention of the appellant, as I understand it, is that this is a suit by an heir claiming inheritance to the property left by Musammat Sundar Dei, that section 66—if it applies at all—allows a suit of this kind to be brought under the second clause of the same section. The contention was that when Musammat Sundar Dei purchased the property in the name of Bhola Nath, the appellant, as her reversioner, could have brought a suit to challenge this act, and she is within her rights in so doing after Musammat Sundar Dei's death. The plea raised is a very ingenious one, but it does not seem to me to be strong enough to take it out of the clear words of section 66. The first clause of section 66 is practically the same as the old section 317, clause (1). That clause has been the subject of several rulings by this Court, one of them being a Full Bench ruling. The words used in section 317 were the subject of careful consideration by five Judges of this Court, and they arrived unanimously at the conclusion that this section was intended to preclude the institution of a suit against the certified purchaser,

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by the beneficial owner or the successor in title of the beneficial owner. In the present case, the beneficial owner is said to have been Musammat Sundar Dei. The appellant, if she has any standing, is a successor in title of the beneficial owner, and unless the Code of Civil Procedure of 1908 has introduced any change, the ruling of this Court holds that she, the appellant, is precluded from instituting a suit against Baldeo. But it is contended that the second clause of section 66 enables the suit to be brought. There is no doubt that Act V of 1908 has introduced new words which did not exist in the second clause of old section 317. So far, I am with the learned counsel for the appellant, but I confess considerable difficulty in following him, as he applies the new words to the present case. Is this a case in which a third person is claiming to proceed against property sold ostensibly to a certified purchaser for a *benamidar* on the ground that he is liable to satisfy a claim of the third person against the real owner? Take it that the real owner was Musammat Sundar Dei. What claim has Musammat Narain Dei against Musammat Sundar Dei which gives her a right to proceed against this property though ostensibly sold to Baldeo? It is to meet this, that her position as reversioner is put forward. It seems to me that it would require a great deal of twisting to make these words fit in with the claim as now brought. My attention was directed to the case of *Achhaibar Dube v. Tapsi Dube* (1). In that case, the finding of this Court was that the purchase was not a purchase made secretly by one person for another, the ostensible purchaser having no interest in the purchase, and the real purchaser wishing for some reason that his name should not appear. In other words, the finding of the Court was, that it was not *benami* purchase. In the present case, however, the contention, right through, of the appellant—as the lower appellate Court points out—has been, that Baldeo was a *benami* purchaser for Musammat Sundar Dei and with her knowledge. An attempt was made to bring the present case within the purview of two rulings of the Madras High Court—*Monappa v. Surappa* (2) and *Sankunni Nayar v. Narayanan Nambudri* (3), and the contention was that section 66 applies not to purchases made by an agent and does not apply when possession has been transferred. Neither of these views have, at any time, so far as I know, found favour with this Court.

“There remains the third plea, viz., to the effect that one-third of the house in dispute was the purchase made at the auction held by the Civil Court and two-thirds were the subject of a private purchase. The purchase is one of a nature similar to that which is made, times out of number, in Civil Court sales. I have been referred to no authority which held that under the circumstances of this kind, namely, where property is sold subject to a lien, the purchaser purchased one fraction at the Civil Court sale and the remaining fraction when he paid off the lien. What the purchaser purchased is the whole of the property, subject to any demands that may be made by the lien advertised at the time of the auction. The appeal fails and is dismissed with costs.”

Pandit Shiam Krishna Dar, for the appellant.

Dr. Tej Bahadur Supru, for the respondents.

(1) (1907) I. L. R., 29 All., 557.

(2) (1886) I. L. R., 11 Mad., 234

(3) (1893) I. L. R., 17 Mad., 282.

RICHARDS, C. J., and BANERJI, J. :—The facts out of which this Letters Patent appeal arises are very clearly stated in the judgement of the learned Judge of this Court. The judgement is reported in 10 A. L. J. R., 97. The suit is to recover, amongst other things, a share in a house by partition, and also for mesne profits. The court of first instance decided in favour of the plaintiff. On first appeal the decision of the court of first instance was reversed so far as the property now in dispute was concerned, on the ground that the claim in respect thereof was barred by the provisions of section 66 of the Code of Civil Procedure. This decision was in due course affirmed by a learned Judge of this Court, and against his decision the present Letters Patent appeal has been preferred.

When the case was before us on a previous occasion we determined that we would consider the evidence in the case without remanding the case and so avoid putting the parties to the expense and delay of referring issues. We granted time to the parties in order that the evidence might be looked into. As a result we are able to consider the present case upon a state of facts which have to be admitted. The house in question was purchased by one Musammat Sundar Dei, the widow of one Bhola Nath. This house was subsequently incorporated into another one which admittedly belonged to Bhola Nath and formed part of his estate. It is quite clear therefore that it was the intention of his widow that this house should be part of her husband's estate and should not remain her separate property. Dr. *Tej Bahadur* has further to admit that he cannot contend on the evidence that the house was not in fact purchased on behalf of the widow, though the purchase was made in the name of Baldeo. We are also satisfied upon the evidence that Musammat Sundar Dei remained in possession of the house up to the time of her death, and that during her life-time Baldeo never pretended that the property was his, or that the auction purchase had been made in reality for his benefit.

The only question therefore for decision in the case is a purely legal one, namely, whether under the circumstances of the present case section 66 of the Code of Civil Procedure prevents the present suit being brought. It is no doubt a suit against a certified auction purchaser, and so far it is within the words of section 66. However, it is contended by the appellant that the plaintiff does not

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imprisonment. The Sessions Judge of Cawnpore referred the case to the High Court recommending that the order should be set aside.

Mr. A. P. Dube, for the applicant.

Munshi Satyz Narain and Maulvi Kamaluddin Ahmad Jafari, for the opposite party.

TUDBALL, J.—In this case one Muhammad Ali made a complaint against the present applicant, Chhedi, charging him with the offence of cheating, under section 420 of the Indian Penal Code. He had prior to that preferred a complaint under Act XIII of 1859, but had withdrawn that complaint and preferred a complaint of cheating. The Magistrate issued process to Chhedi; a date was fixed; evidence of the prosecution witnesses was taken, and then a further date was fixed for their cross-examination. There were a few postponements and the cross-examination did not take place. Then, suddenly, without examining the accused or framing any charge against him or taking any defence, and relying on the statements in chief of the prosecution witnesses, the Magistrate passed an order purporting to be under Act XIII of 1859, to the effect that Chhedi was either at once to repay the advance of Rs. 60 or give security for Rs. 60 with one surety that he would make two pairs of boots every week for Muhammad Ali; in default of carrying out one of the two orders already mentioned, he was to undergo rigorous imprisonment for two months. Chhedi was sent to jail. The case has been referred to this Court by the learned Sessions Judge with the recommendation that the order be set aside. Further comment is unnecessary. The Magistrate has acted quite illegally. There was no case under Act XIII of 1859 before the Magistrate. That Act can only be put in motion by the employer. I set aside the order of the Magistrate and direct that the complaint of Muhammad Ali be heard *de novo* by some other Magistrate to whom the District Magistrate may think fit to transfer it and not by the Magistrate whose order has just been set aside.

Order set aside.

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Banerji.
 PRAG NARAIN AND OTHERS (PLAINTIFFS) v. KADIR BAKHSH AND OTHERS
 (DEFENDANTS)*

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January, 4.

Act No. IV of 1882 (Transfer of Property Act), section 111, clause (g) — Landlord and tenant — Denial of title — Suit for ejectment of tenant — Landlord's intention to take advantage of denial of title to be expressed before suit.

The denial of his landlord's title by a tenant, in order to work a forfeiture under section 111 (g) of the Transfer of Property Act, 1882, must be an unequivocal and unambiguous denial: mere non-payment of rent or even the mortgaging of the premises as belonging to the tenant does not necessarily constitute such a denial. A landlord wishing to take advantage of his tenant's denial a title to determine the lease must do some act showing his intention to do so before he can file a suit for ejectment.

THIS was an appeal under section 10 of the letters Patent from a judgement of a single Judge of the Court. The facts of the case are stated in the judgement under appeal, which was as follows:—

"These appeals arise out of a suit brought by the respondent for the ejectment of the appellants from a plot of land in the city of Agra. The case stated in the plaint was that the six defendants were tenants of the land, paying three annas a month as rent, that for five years preceding the suit the defendants had paid no rent, though they had been repeatedly required to do so, and that they had forfeited their lease by non-payment of the rent. There were other allegations regarding constructions on the land with which we are not now concerned. The defendants filed their written statements in June, 1910. In September, 1910, the plaintiffs applied to the court for permission to amend their plaint by inserting in it an allegation that two of the defendants had denied the plaintiffs' title to the land. The plaint was amended and the defendants were given an opportunity of filing a fresh written statement. They then denied that they had forfeited their lease either by non-payment of rent or by denying the plaintiffs' title. They pleaded that they were perpetual lessees of the land, and also that the suit was not maintainable as the plaintiffs had not given them formal notice to quit.

"The Munsif found that the plaintiffs' title in respect of half of the land had been denied by the defendant, Khuda Bakhsh, and he gave the plaintiffs a decree for the ejectment of that defendant and for possession of half of the land. On appeal the Subordinate Judge gave the plaintiffs a decree for possession of the whole of the land, holding that they had forfeited their lease both by non-payment of rent and also by denial of plaintiffs' title.

"The first question discussed in this Court was, whether the defendants held as perpetual lessees or as tenants from month to month. In the view which I take of the case it is unnecessary to decide this question.

"The next question is, whether the defendants have forfeited their lease by non-payment of rent. It is neither alleged nor proved that it was a

* Appeal No. 72 of 1912 under section 10 of the Letters Patent.

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condition of the lease that it should be forfeited in case of non-payment of rent. This ground fails.

"The next question is whether the defendants forfeited their lease by reason of their denial of the plaintiffs' title. One of the defendants, Khuda Bakhsh, mortgaged part of a house, expressly including the land. Another defendant, Kadir Bakhsh, mortgaged half the house on the land but did not expressly include the land in the mortgage. In the former case it seems that there was a denial of the plaintiffs' title to the land. In the latter it cannot be said that there was a denial of their title. It has been held that denial of a landlord's title by one of several lessees does not cause a forfeiture of the lease. But I need not discuss this question further, for in my opinion the plaintiffs' suit must be dismissed even if it be proved that the defendants denied the plaintiffs' title. Section 111 of the Transfer of Property Act, which admittedly applies to this case, provides that a lease of immovable property determines in various ways, amongst others, by forfeiture. Clause (g) of the section runs as follows:—'By forfeiture, that is to say, (1) in case the lessee breaks an express condition which provides that on breach thereof the lessor may re-enter, or the lease shall become void; or (2) in case the lessee renounces his character as such by setting up a title in a third person, or by claiming title in himself; and in either case the lessor or his transferee does some act showing his intention to determine the lease.'

"It is contended on behalf of the defendants that it has neither been alleged nor proved that the lessors did any act showing their intention to determine the lease. On behalf of the plaintiffs it is contended that the institution of the suit was sufficient to show their intention to determine the lease within the meaning of the clause. In the case of *Anandamoyee v. Lakhi Chandra Mitra* (1) it was held by Ghose and Pargiter, J J., that in a suit of this kind it must be shown that the plaintiff declared his intention to determine the lease of the defendant and that such intention was declared by some act or otherwise before the institution of the suit. In my opinion that decision was correct. It is contended by Dr. Tej Bahadur that section 112 of the Transfer of Property Act shows that a forfeiture may be completed by the institution of a suit, but it appears to me that section 112 does not show this. The opening words of the section are 'a forfeiture under section 111, clause (g).' The word 'forfeiture' must mean a complete forfeiture and not merely that a tenant has incurred liability to have his lease forfeited. The closing words of clause (g) of section 111 seem to add something to the English law on the subject and were possibly inserted in order that there might be no doubt that an alleged forfeiture must be complete before a suit is brought. The construction adopted by the Calcutta High Court is in accordance with the general rule that a cause of action must be complete at the date of the institution of a suit, and cannot be completed either by the plaint or by the written statement or any other pleading in the suit. I hold that the institution of the suit was not an act showing an intention to determine the lease within the meaning of section 111, clause (g).

"I was asked by the learned advocate for the plaintiffs to follow the course taken by the Calcutta High Court in the case cited, namely to remit an issue to the court below for a finding as to whether an intention to determine the

tenancy was declared by the plaintiffs before the institution of the suit in the present case, I think, I ought not to do so. As already stated, the fact that a forfeiture had occurred by denial of the landlord's title was not in the plaint when it was filed, but was added several months afterwards. The action begins with the words '*Daryaft karne se malum hua.*' If these words mean anything, they mean that the plaintiffs have come to know of the fact after the institution of the suit. If the plaintiffs were not aware of the fact having been committed by the tenants, which rendered the lease void, they forfeited, they could not have indicated an intention to determine the lease on that account. To frame and remit an issue would, under the circumstances, be an encouragement to the production of false evidence. I allow the appeal and set aside the decree of the courts below and dismiss the plaintiffs' suits with costs in all three courts. The plaintiffs are at liberty to withdraw the money deposited in the court below on account of rent. Mr. *Ghulam Muhammad* on behalf of his clients that they have no objection to this."

The Hon'ble Dr. *Tej Bahadur Sapru*, for the appellants.

The denial of the landlord's title took place when the tenant mortgaged the house with the land, and the tenant was, therefore, liable to ejectment. The deed hypothecated the land and the mortgagor said belonged to him, along with the house. The question for decision was whether the filing of the suit was sufficient notice for determining the lease, within the meaning of section 111 (g) of the Transfer of Property Act. It was submitted that section 111 (g) of the Transfer of Property Act, was to be read with section 112. It was necessary to do any act other than that of filing a suit to determine the lease. There was a denial of title, and there was no act to show that there was any act of waiver on the part of the landlord.

Maulvi *Ghulam Mujtaba*, for the respondents, was asked to reply.

RICHARD, C. J., and BANERJI, J.:—This appeal arises out of a suit in which the plaintiffs sought to recover certain household goods situate in the city of Agra. The plaintiffs based their claim on alleged forfeiture. The acts which the plaintiffs contended constituted a forfeiture were, first, non-payment of rent and secondly, denial of the plaintiffs' title. So far as non-payment of rent concerned, the court below has held, and we think rightly, that mere non-payment of rent is not, in itself, sufficient to constitute a forfeiture of a tenant's interest. The other act was the denial of two mortgages. In one of these mortgages the house

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as the land is mortgaged. The mortgagor states in the mortgage, that he mortgages the house together with the land, which belong to him, without the participation of any other sharers. No further evidence of acts by the lessees denying the plaintiffs' title has been given, nor has it been shown that the lessors, prior to the institution of the suit, did any act showing their intention to determine the tenancy as the result of the alleged denial of their title by the tenants. It may well be doubted whether the mere making of the mortgages, in more or less ambiguous terms, amounted in fact to a denial of the plaintiffs' title at all. They were acts which might very well have been explained by the tenants, had they been allowed an opportunity of doing so. The denial in our opinion ought to be an unequivocal and unambiguous denial of the plaintiffs' title. The learned Judge of this Court, however, accepted the contention that the making of the mortgage, in which the land as well as the house was mortgaged, did amount to a denial of the plaintiffs' title. But he held that the plaintiffs had no right to institute the present suit until they had complied with the provisions of section 111 of the Transfer of Property Act, which provides that where the lessee has denied his landlord's title the lessor must do some act showing his intention to determine the lease. It was contended at the first hearing in this Court, as also in this present Letters Patent appeal, that the institution of the suit was sufficient compliance with the section. In our opinion the learned Judge of this Court was right in holding that the institution of the suit was not a sufficient compliance. In our judgement the act showing the intention to determine the lease must have been done before the suit was instituted. We accordingly dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Sir Harry Griffin and Mr. Justice Chamier.

BASANT LAL (PLAINTIFF) v. CHHIDAMMI LAL AND ANOTHER (DEFENDANTS).*

Act No. IX of 1908 (Indian Limitation Act), schedule I, articles 91 and 120—

Limitation—Suit for declaration that nominal lessee is not the beneficial lessee but merely benamidar for the plaintiff.

Held that a suit for a declaration that the defendant, whose name appeared in a certain lease as lessee, had no interest under the lease and that the person really interested in the lease was the plaintiff, was governed as to limitation by article 120 and not by article 91 of the first schedule to the Indian Limitation Act, 1908, the cause of action accruing to the plaintiff when his position as a lessee was challenged.

THIS was a suit asking for a declaration that the first defendant, whose name appeared as lessee in a certain lease, had no interest under the lease and that the person really interested in the lease was the plaintiff, for whom the first defendant acted as benamidar. The court of first instance dismissed the suit as barred by limitation, applying article 91 of the first schedule to the Indian Limitation Act, 1908. The plaintiff appealed to the High Court.

Munshi *Haribans Suhai*, for the appellant.

Mr. *Ibn Ahmad*, for the respondents.

GRIFFIN and CHAMIER, J.J. :—The suit of the appellant has been dismissed by the court below on the ground that it is barred by article 91 of the first schedule to the Limitation Act. The view taken by the Subordinate Judge is that the suit is one to cancel or set aside an instrument and that time began to run against the appellant more than three years before the suit was brought. On examining the plaint we find that the suit is not one to cancel or set aside an instrument. The appellant has asked for a declaration in effect that the first defendant whose name appears as lessee in a certain lease has no interest under the lease and that the person really interested under the lease is the appellant for whom the first defendant acted as benamidar. It seems to us that the suit is governed by article 120 and that the cause of action accrued to the appellant when his position as a lessee was challenged by the first defendant. We allow this appeal, set aside the decree of the court below and remand the case to that court to be disposed of according to law. Costs in this Court will be costs in the cause.

Appeal decreed and cause remanded.

* First Appeal No. 288 of 1911, from a decree of Pitambar Joshi, Second Additional Judge of Moradabad, dated the 24th of May, 1911.

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January, 8.

Before Mr. Justice Sir Harry Griffin and Mr. Justice Chamier.

SHAMI NATH SAHI AND ANOTHER (DEFENDANTS) v. LALJI CHAUBE AND ANOTHER (PLAINTIFFS.) *

Act No. IX of 1875 (Indian Majority Act), section 3—Guardian and minor—Effect of appointment of Hindu widow as guardian of her minor sons—Sale of minor's property.

A Hindu died leaving a widow and two minor sons. The widow was appointed in 1890 guardian of the two sons, and in 1891 obtained sanction from the District Judge for the sale of half of the property of the minors. In 1906, the widow and the elder son, who had then attained majority, sold part of the property of the sons amounting to somewhat less than half. Within three years of his coming of age the younger son sued for a declaration that the sale of 1906, and mortgage executed in 1902 were not binding on his interest in the property purporting to be dealt with thereby.

Held (1) that the appointment of the mother as guardian had the effect of prolonging the minority of both sons until they reached the age of twenty-one years; and (2) that the sanction of the Judge given in 1891 could not validate a sale which was not made until 1906. *Gharib-ullah v. Khalak Singh* (1) distinguished.

THE facts of this case were as follows:—

One Udit Narain Chaube died several years ago leaving a widow, Musammat Rukmina, and two sons, Lalji Chaube and Gopal Chaube, respondents to this appeal. Both sons were minors when their father died. Mutation of names seems to have been effected in favour of the widow as well as the two sons. But it is common ground that the two sons only succeeded to the property with which we are now concerned, namely, a five anna four pie share in a village called Koelaswa. In September, 1890, the widow was appointed by the court to be the guardian of her two sons, and in the following year she obtained from the District Judge permission to sell half the share in the village. No action seems to have been taken on that permission. On the 10th of February, 1906, the widow and the elder son, Gopal, who had attained majority, sold a two anna, 3 pie, 13½ chitaks share to the appellants for a stated consideration of Rs. 5,774. The younger son, Lalji, alleging that he came of age less than three years before the institution of the suit, sued for a declaration that the sale deed of the 10th of February, 1906, and a mortgage, dated the 1st December, 1902, were not binding on him, and prayed that they may be cancelled and that he might be put

* First Appeal No. 371 of 1911 from a decree of Jagat Narain, Subordinate Judge of Gorakhpur, dated the 5th of August, 1911.

(1) (1903) I. L. R., 25 All., 407.

in possession of the share which was sold. The court below decreed the claim so far as it relates to the plaintiff's own share, that is, as to half of the property covered by the deed of sale. The purchasers appealed to the High Court.

Mr. *D. R. Sawhny*, for the appellants.

Munshi *Kalindi Prasad* and Munshi *Durg Charan Singh*, for the respondents.

GRIFFIN and CHAMIER, J.J.:—Udit Narain Chaube died several years ago leaving a widow, Musammat Rukmina, and two sons, Lalji Chaube and Gopal Chaube, respondents to this appeal. Both sons were minors when their father died. Mutation of names seems to have been effected in favour of the widow as well as the two sons. But it is common ground that the two sons only succeeded to the property with which we are now concerned, namely, five annas four pies share in a village called Koelaswa. In September, 1890, the widow was appointed by the court to be the guardian of her two sons, and in the following year she obtained from the District Judge permission to sell half the share in the village. No action seems to have been taken on that permission. On the 10th February, 1906, the widow and the elder son, Gopal, who had attained majority, sold a two anna, 3 pie, $13\frac{1}{2}$ chitaks share to the appellants for a stated consideration of Rs. 5,774. The younger son, Lalji, who alleges that he came of age less than three years before this suit was brought, has sued for a declaration that the sale deed of the 10th of February, 1906, and a mortgage, dated the 1st December, 1902, are not binding on him and he prays that they may be cancelled and that he may be put in possession of the share which was sold. The court below has decreed the claim so far as it relates to the plaintiff's own share, that is, as to half of the property covered by the deed of sale. The purchasers have appealed. The first point taken in appeal is that the suit is barred by limitation for two reasons, namely, that the plaintiff attained majority when he completed his eighteenth year, and, secondly, that, even if the plaintiff attained his majority when he completed his twenty-first year, the present suit was not instituted within three years of the date on which he attained his majority. In support of the first argument we are referred to the

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decision of the Privy Council in *Gharib-ullah v. Khalak Singh*, (1). In that case, one Chet Singh died leaving three sons, two of whom were minors, and his widow was appointed by the Court to be the guardian of the persons and property of the two minors. Their Lordships held that the interest of a member of a joint family was not individual property at all and that therefore the widow of Chet Singh, though appointed guardian of the minors by the court, had nothing to do with the family property and had no right to join with the eldest son in making a transfer of it. Their Lordships expressly refrained from deciding the question whether the appointment of the widow as guardian of the two minors would have the effect of prolonging their minority. In the present case when Musammat Rukmina was appointed guardian of her sons, both of them were minors. The appointment was therefore not open to the objection considered by their Lordships of the Privy Council, and we must hold that under section 3 of the Indian Majority Act the sons did not attain majority until they completed their twenty-first year. The result is that the plaintiff Lalji must be held to have attained his majority when he completed his twenty-first year. On the evidence the court below has held that the present suit was instituted within three years of the date on which the plaintiff completed his twenty-first year. We have not been asked to review that evidence. The Subordinate Judge seems to have given good reason for the conclusion at which he has arrived, and we, therefore, agree with him in holding that the suit is not barred by limitation.

The second point taken by the appellants is that the sale to them was made with the sanction of the District Judge. The so-called sanction was obtained in September, 1891. The sale deed in question was executed in February, 1906, about fourteen and a half years afterwards. The sanction is referred to in the sale deed as if it authorized the transfer of the property. But it is quite clear that the District Judge in 1891 did not intend to sanction the transfer of the minor's property fifteen years later when the circumstances of the family must have altered considerably. In our opinion the transfer cannot be supported by the sanction given in

1891. We would observe also that this point was not definitely taken in the memorandum of appeal before us.

There remains the question whether the transfer is supported by legal necessity. We were referred to some cases in which the question was considered whether transfers made by a father were binding on his sons. Those cases have no bearing on the present case. If the transfer is to be held valid it must be on the ground that it was made for legal necessity and it was not enough for the appellants to show that part of the consideration was devoted to the discharge of pre-existing debts. Of the stated consideration of Rs. 5,774, a sum of Rs. 3,319-8-0 was left in the hands of appellants for the discharge of a mortgage held by one Doman Bhagat. The plaintiff concedes that that mortgage is binding on him. But it is not suggested that it was necessary to sell the property merely to discharge that mortgage. As a matter of fact the appellants have not yet discharged that mortgage. The remainder of the consideration is made up of several items, each of which was considered separately by the court below. We have not been taken through the evidence regarding these items. But it appears from the judgement of the Subordinate Judge that all that was attempted to be proved was that the majority of the various items were previously existing debts. There is no evidence that these debts were incurred for necessity or for the benefit of the family, and there is no evidence that the appellants made any inquiry regarding them or that they were induced to believe and did believe that the debts were incurred for legal necessity. One of the appellants was examined as a witness, and he does not even suggest that he made any inquiry. The result is that the appellants have failed to prove that there was any necessity for the sale of the property. There being no cross appeal by the plaintiff in this case, we are relieved from the necessity of considering whether the sale should have been set aside in its entirety. The decree, so far as it goes, appears to be correct. The appeal fails, and is dismissed with costs.

Appeal dismissed.

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APPELLATE CRIMINAL.

Before Mr. Justice Tudball.

EMPEROR v. TULSI RAM AND OTHERS.*

*Criminal Procedure Code, sections 35 and 408—Appeal—"Aggregate sentences"
—Concurrent sentences not aggregate.*

Held that the term "aggregate sentences" as used in sub-section (3) of section 35 of the Code of Criminal Procedure applies only to consecutive and not to concurrent sentences. Where therefore an Assistant Sessions Judge passes concurrent sentences and the whole term to be served by the convict does not exceed four years, the appeal under section 408 of the Code does not lie to the High Court but to the Sessions Judge. *Sher Muhammad v. Emperor of India* (1), *Emperor v. Tulshidas Lakshman* (2) and *Regina v. Gulam Abas* (3) approved and followed. *Abdul Khalek v. King-Emperor* (4) dissented from.

THE facts of this case were as follows:—

Tulsi Ram, Chotey Lal and others were convicted by the Assistant Sessions Judge of Aligarh, some of them of offences under sections 304 and 147 and others of offences under sections 325 and 147 of the Indian Penal Code. The persons named above were each sentenced to four years' rigorous imprisonment under section 304, and one year's rigorous imprisonment under section 147, the two sentences to run concurrently. They filed appeals in the High Court, and at the hearing a preliminary objection was raised that, having regard to sections 35 and 408 of the Code of Criminal Procedure the appeals lay to the Sessions Judge and not to the High Court.

Mr. C. Dillon, and Babu Satya Chandra Mukerji, for the appellants.

The Assistant Government Advocate (Mr. R. Malcomson), for the Crown.

TUDBALL, J:—The appellants in this case were convicted by the Assistant Sessions Judge of Aligarh, some of them of offences under sections 304 and 147 and some of them under sections 325 and 147 of the Indian Penal Code. Of these, two persons, Tulsi Ram and Chotey Lal, were each sentenced to four years' rigorous imprisonment under section 304 and one year's rigorous imprisonment under section 147, the two sentences to run concurrently.

* Criminal Appeal No. 846 of 1912 from an order of Kunwar Sen, Assistant Sessions Judge of Aligarh, dated the 25th of October, 1912.

(1) *Punj. Rec.*, 1901, Cr. J., 83. (3) (1875) 12 Bom. H. C. Rep., 147.
(2) (1909) 11 Bom. L. Rep., 544. (4) (1912) 17 C. W. N., 72.

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These two have filed their appeals here, and the question arises whether these appeals have been rightly filed in this Court or whether they lay to the court of the Sessions Judge. Section 408 says that when in any case an Assistant Sessions Judge passes any sentence of imprisonment for a term exceeding four years, the appeal shall lie to the High Court. This is in clause (b) of the proviso; otherwise under the opening clause of the section an appeal would lie to the Court of Session. It has been urged that under section 35(3) and section 408 the total of the two sentences passed being five years the appeal lies to this Court. Clause (3) of section 35 lays down that for the purpose of appeal, aggregate sentences passed under the section in case of convictions for several offences at one trial shall be deemed to be a single sentence. It is quite clear to my mind that the words, 'aggregate sentences' and in fact the whole of clause (3), relate to the case of consecutive sentences mentioned in clause (2). The word 'aggregate' implies an adding together of separate items, and where sentences are concurrent there is no such aggregation. As a matter of actual fact the sentences which these two appellants would have to undergo on the decision of the Assistant Sessions Judge are sentences of four years' rigorous imprisonment each, and no more.

My attention has been called to the decision of the Calcutta High Court in *Abdul Khalek v. King-Emperor* (1). The ruling, no doubt, is in the appellant's favour, but the judgement gives no reasons. On the other hand the point was considered in the case of *Sher Muhammad v. Emperor of India* (2) and it was therein held that where two sentences had to run concurrently there could be no aggregation of sentences, and as there was no sentence of imprisonment for a term exceeding four years the appeal lay to the Sessions Court. That was in the case of a decision by an Additional District Magistrate. The same point was considered in *Emperor v. Tulshidas Lakshman* (3). The ruling of the Punjab Chief Court and also an old ruling of the Bombay High Court itself, *Regina v. Gulam Abas* (4), were followed. In my opinion these decisions are perfectly correct, and as these two appellants have not been sentenced to imprisonment for terms exceeding four years by the Assistant Sessions Judge, their appeals will

(1) (1912) 17 O. W. N., 72.

(2) *Punj. Rec.* 1901, Cr. J., 83.

(3) (1909) 11 Bom. L. Rep., 544.

(4) (1875) 12 Bom. H. C. Rep., 147.

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lie to the court of the Sessions Judge. I therefore direct that the memorandum of appeal be returned to the appellants to be filed in the proper court. The Sessions Judge will no doubt under the circumstances of the case admit the appeal although they may be out of time when presented to him.

Memorandum of appeal returned.

REVISIONAL CIVIL.

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January, 9.

Before Mr. Justice Tudball.

ABDUL HAMID KHAN (PLAINTIFF) v. BABU LAL AND OTHERS
(DEFENDANTS).*

Act No. X of 1897 (General Clauses Act), section 3 (25)—Act No. IX of 1887 (Provincial Small Cause Courts Act), schedule II, article 13—Court of Small Causes—Jurisdiction—Ferry—"Immovable property"—Suit to recover tolls alleged to be due to plaintiff as lessee of a ferry.

Held that the right to a ferry is a benefit which arises out of land and comes within the definition of immovable property under section 3 (25) of the General Clauses Act, 1897, and a suit by a lessee of a ferry to levy a toll alleged to be recoverable by him as such lessee falls under article 13 of the second schedule to the Provincial Small Cause Courts Act and is therefore not cognizable by that court. *Gokal Chand v. Lal Chand* (1) and *Desa Singh v. Narain Das* (2) approved.

THE plaintiff in the case out of which the present application arose was the lessee of a certain ferry from the cantonment authorities of Allahabad. He filed a suit in the Court of Small Causes to recover from certain fishermen sums of money to which he alleged himself to be entitled as lessee of the ferry by way of a toll on their boats. The Court of Small Causes returned the plaint, holding that, by reason of section 3 (25) of the General Clauses Act, 1897, and article 13 of the second schedule to the Provincial Small Cause Courts Act, 1887, the suit was not cognizable by that Court. The plaintiff thereupon applied in revision to the High Court.

Maulvi Ghulam Mujtaba, for the applicant.

Babu Sital Prasad Ghosh, for the opposite parties.

TUDBALL, J.:—This is an application in revision against the order of the Judge of the Small Cause Court at Allahabad. The plaintiff, who is the applicant here, is a lessee of a ferry from the Cantonment Committee of Allahabad. The defendants are

* Civil Revision No. 113 of 1912.

(1) *Punj. Rec.*, 1897, C. J., 215.

(2) *Punj. Rec.*, 1898, C. J., 278.

fishermen, who, according to the plaintiff, are landing their fish on the river bank where his ferry is situate. He claims that as lessee of the ferry he is entitled to a fixed toll of Rs. 8 per boat. The suit was instituted in the Court of Small Causes at Allahabad, and the Judge of that court has held that he had no jurisdiction, as the suit is one which falls under article 13 of the second schedule to the Provincial Small Cause Courts Act. The plaintiff comes here in revision and urges that the suit is cognizable by the court below. Article 13 contemplates a suit to enforce payment of dues when such dues are payable to a person by reason of his interest in immovable property and the question is whether the plaintiff by reason of his lease of the ferry has an interest in immovable property. The point was considered in two cases, namely, *Gokal Chand v. Lal Chand* (1) and *Desa Singh v. Narain Das* (2). The right to a ferry no doubt is a benefit which arises out of land and comes within the definition of immovable property under section 3 (25) of the General Clauses Act. I fully agree with the two above mentioned rulings. In my opinion the order of the court below is perfectly right. I dismiss the application. The costs of this application will abide the result and will be costs in the cause.

Application dismissed.

Before Mr. Justice Tudball.

KALYAN MAL (PLAINTIFF) v. SAMAND AND OTHERS (DEFENDANTS).*

Act (Local) No. II of 1901 (Agra Tenancy Act), sections 58 and 200—Appeal—Question of proprietary title—Defendants setting up a title as mortgagees of the proprietary rights.

In a suit for ejectment under section 58 of the Agra Tenancy Act, 1901, the defendants pleaded that they were not tenants but mortgagees of the proprietary rights of which the plaintiff was alleged to be the purchaser of the equity of redemption. *Held* that this amounted to a distinct claiming of a proprietary title or at least of a portion of the bundle of rights which go to make up a proprietary title and the appeal would lie to the District Judge.

THE facts of this case are fully stated in the judgement of the Court.

Mr. M. L. Agarwal, for the applicant.

Maulvi Muhammad Ishaq, for the opposite parties.

* Civil Revision No. 111 of 1912.

(1) *Punj. Rec.*, 1897, C. J., 215,

(2) *Punj. Rec.*, 1898, C. J., 278.

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TODBALL, J.—This application for revision arises out of the following circumstances:—One Abdul Rahman was a zamindar of plot No 1381, which is involved in the present suit. He cultivated it as his *sir* land. On the 11th of May, 1892, he gave a usufructuary mortgage to the predecessors in title of the present defendants. In 1897 Abdul Rahman's proprietary rights were sold in execution of a decree and purchased by Kalyan Mal. Subsequently to this the heirs of Abdul Rahman were recorded in the *patwari's* papers as exproprietary tenants of that plot. The mortgagees under the deed of the 11th of May, 1892, were recorded as mortgagees of the exproprietary tenure. Kalyan Mal brought a suit against the heirs of Abdul Rahman for the rent of this plot and obtained a decree, and the formality of ejection was gone through, on the 27th of December, 1910. As a matter of fact the mortgagees remained in possession and were no parties whatever to the proceedings in the Revenue Court taken by Kalyan Mal. The present suit, out of which this application has arisen, was brought against the mortgagees, the predecessors in title of the opposite party, ostensibly under section 58 of the Tenancy Act. The defence of the mortgagees to the suit was that the relation of landlord and tenant did not exist between the parties and that they were the mortgagees of the proprietary rights. In other words they clearly set up their mortgage, and said that Kalyan Mal was a mortgagor, having acquired the equity of redemption and that they were the mortgagees. The first court dismissed the suit, holding that the relationship of landlord and tenant did not exist between the parties. Kalyan Mal appealed to the Commissioner, who held that a question of proprietary title was involved in the case and that an appeal lay to the District Judge. On the 24th of February, 1912, he returned the appeal for presentation to the proper court. The appeal was presented on the 26th of February, 1912, to the District Judge. An affidavit was filed. The appeal was admitted and then on the 19th of June, the District Judge made the following order:—
“Heard pleader. A mortgagee of a right to occupy *ex sir* land has been ejected, as the expropriator relinquished, though without redeeming the mortgagee. There is no question of proprietary title, nor was any question of jurisdiction decided in the lower court. No appeal lies here. Returned.”

It is perfectly clear that the defendants distinctly claimed a proprietary title, or at least a portion of the bundle of rights which go to make up proprietary title. An appeal did lie to the District Judge. I, therefore, admit the application, set aside the order of the District Judge and direct the Judge to readmit the appeal on its original number and proceed to hear and decide it according to law. I make no order as to costs.

Application allowed.

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Banerji.
BHARAT INDU AND OTHERS (PLAINTIFFS) v. YAKUB HASAN AND ANOTHER
(DEFENDANTS).^{*}

Civil Procedure Code (1908), order XX, rule 18—Partition—Appeal—Preliminary decree—Subsequent interlocutory order giving directions for preparation of final decree.

In a suit for partition a preliminary decree was passed and confirmed on appeal. When the case went back to the court of first instance for the passing of a final decree that court passed an order directing that actual partition should be made in accordance with certain directions then given by it. *Held* that no appeal would lie against such an order, but its propriety could be questioned in appeal from the final decree. The Code of Civil Procedure contemplated the preparation of only one preliminary decree, and the order in question could not be regarded as more than an interlocutory order containing directions as to the preparation of the final decree.

THIS was an appeal under section 10 of the Letters Patent from a judgement of a single Judge of the Court. The facts of the case are set forth in the judgement under appeal, which was as follows :—

"This was a suit for partition of certain houses. A preliminary decree was passed dismissing a portion of the claim, but declaring the plaintiff's right to possession by partition of certain specified shares in each of the two houses. This declaration was, however, subject to a condition, viz., that a smaller fractional share in each house, that is to say, a portion of the share declared to belong to the plaintiffs, was subject to a charge of Rs. 877-0-0 in favour of the defendant Yakub Husain and directing that the plaintiffs should pay the same before they could obtain possession. That decree was contested up to Letters Patent appeal before the Court, and was substantially affirmed. The plaintiffs then presented to the court of first instance an application to the effect that they had no desire to redeem the fractional shares subject to the charge of Rs. 877, but could be content with actual partition of a smaller share in each house arrived

^{*} Appeal No. 79 of 1912 under section 10 of the Letters Patent.

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at by deducting the share subject to the charge from the share decreed in their favour in the preliminary decree. The learned Subordinate Judge, on receiving this application, proceeded to frame certain issues. He came to the conclusion that the plaintiffs were in effect abandoning a portion of their claim, and that they had a right to do this at any stage of the suit, even after the passing of the preliminary decree. Dealing with the question on this basis, he arrived at the conclusion that the plaintiffs were entitled without making any payment at all, to a share of $\frac{7}{10}$ in one house, and of one-third in the other. He ordered separation by actual partition by metes and bounds of the shares thus ascertained from the rest, of each of the houses in question, and a formal order was drawn up which undoubtedly reads like a preliminary decree in a partition suit and fulfils all conditions of such a decree, embodying the declaration and the direction above stated. An appeal against this having been lodged in the court of the District Judge, the learned District Judge has held that the order complained of is not a decree and that no appeal lies against the same. This order is supported before me on behalf of the respondents on the ground that there can not be more than one preliminary decree in a suit for partition, and that the defendant should be content to wait for the passing of a final decree in the suit, when he would be entitled in appeal from such a decree to challenge the correctness of the order now in question. After examining the record it seems to me that this much is certainly clear, viz., that the learned Subordinate Judge concerned himself to the the passing a second or supplementary preliminary decree in the suit, as if on an amended plaint. It is a little difficult to discuss the abstract question whether an appeal lies or not, without allowing it to be complicated by the further question whether the order complained of is a good order in law, or one which the learned Subordinate Judge was entitled to pass. I take the defendant's contention to be that the learned Subordinate Judge had no right to do anything beyond correctly interpreting and carrying out the terms of the preliminary decree before him. If the learned Subordinate Judge had dealt with the matter from this point of view, that is to say, that the only question before him was whether the preliminary decree as passed would or would not bear a certain interpretation, an order passed by him on this basis would be a mere interlocutory order only to be challenged by way of appeal from the final decree. The order before me, however, is not of this nature. It seems to me that the learned Subordinate Judge dealt with the matter upon a new set of facts which had come into existence since the passing of the preliminary decree which had been appealed to this Court. He considered that the plaintiffs were abandoning a portion of their claim and had a right to take such a step, with or without any formal amendment of the plaint, even after a preliminary decree had been passed. If this view is correct, it necessarily involves the passing of a second preliminary decree on a new set of facts. There is no force in the analogy which was pressed upon me in argument between the present case and that of a plaintiff in a partition suit, who acquires, by inheritance or otherwise, a further share in the property in suit after the preliminary decree has been passed. If, however, the learned Subordinate Judge was mistaken in the point of view from which he regarded the plaintiff's application, and if as a matter of fact nothing could happen which would justify the passing of a second

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or supplementary decree, then his whole proceedings are open to question because he did not confine himself to merely interpreting the preliminary decree as originally passed, but undoubtedly thought it to be susceptible of modification in view of facts which had subsequently occurred, namely, the abandonment by the plaintiffs of a portion of their claim. To sum up, therefore, my opinion regarding this appeal, I hold that it is not in itself an impossibility that there should be a second preliminary decree passed in a suit for partition if such second decree is based upon facts or circumstances alleged to have come into existence after the passing of the first preliminary decree. I hold that the question whether in the present case any circumstance had or had not occurred since the passing of the first preliminary decree sufficient to justify the passing of a second preliminary decree, is a question which has to do with the merits of the decision now called in appeal and not with the question whether an appeal lies. I hold that the order appealed against is in fact a second preliminary decree in this partition suit and was intended to be a second preliminary decree, and was open to appeal to the District Judge. I therefore set aside the order of the lower appellate Court and remand this case to that court under the provisions of order XLI, rule 23, of the Code of Civil Procedure, directing it to be re-admitted to the file of pending appeals and dispose it of accordingly. Costs will abide the event."

Babu Sarat Chandra Chaudhri (for Dr. Satish Chandra Banerji), for the appellants :—

The respondents should have waited till a final decree was passed. The law only contemplated one preliminary decree. See Code of Civil Procedure, order XX, rule 18. The court could have passed a preliminary decree with directions for further inquiry. Matters could be inquired into with a view to facilitate the preparation of the final decree. The judge did not make a second preliminary decree. He laid down the lines on which the final decree was to be passed. Any objection could be taken in appeal against the final decree. At this stage no appeal lay. The order passed was not a decree.

Babu Piari Lal Banerji, for the respondents :—

Any directions for preparation of the final decree were in the nature of interlocutory orders; but the court could not pass an amended decree in substitution of the first preliminary decree. No appeal lay against an interlocutory order; but this order went beyond that; for example, if after the preliminary decree one of the defendants dies and the plaintiff claims that his share has been augmented and the court makes an adjudication, could not then he appeal from that order? It was submitted that he could. If a court reviews its judgement after appeal the order is not a nullity

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and an appeal lies. A decree was any order declaring the rights of parties and the second order here did so, inconsistently with the first decree.

RICHARDS, C.J., and BANERJI, J.:—The facts out of which this appeal arises are very shortly as follows:—There was a suit for partition. A preliminary decree was made. Appeals right up to a Letters Patent appeal were taken against that preliminary decree, but without success, and the decree of the court which made the preliminary decree for partition was confirmed. On the case going back to the court of first instance for the passing of a final decree an application was made by the plaintiff in which he asked to be allowed to abandon certain shares to which he had been declared entitled subject to a charge. His case apparently was that he would not press for these shares because they were not worth the charge. He also stated that, having regard to certain events which had happened whilst the appeals were pending, the shares of certain other persons had been acquired by him, and he asked that his share on partition might be augmented accordingly. The court of first instance went into these matters and granted the plaintiff's application and directed that actual partition should be made in accordance with his decision. There was an appeal against this decision to the lower appellate Court. It held that no appeal lay inasmuch as no final decree had as yet been made. An appeal was then preferred to this Court, and a learned Judge of this Court set aside the decree of the lower appellate Court holding that the decision of the court of first instance appealed against was really a second preliminary decree. We think that the decision of the learned Judge of this Court was not correct. The Code of Civil Procedure contemplates one preliminary decree and no more. We do not for a moment suggest that any hardship has been done to the respondent by the decision of the court of first instance. We, however, think that we should state in our judgement, that it must be clearly understood that it will be open to the respondent to challenge the propriety of the decision of the court of first instance, dated the 19th of August, 1911, after a final decree has been made in the matter. That order in our opinion is only to be regarded as an interlocutory order preparatory to the making of a final decree. We accordingly allow the appeal, set aside the order of the learned Judge of this

and restore that of the lower appellate court. We direct the costs of all these proceedings shall be costs in the cause.

App'al allowed.

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Before Mr Justice Tudball and Mr. Justice Muhammad Rafiq.
GULAB CHAND (DEFENDANT) v. SHANKAR LAL, (PLAINTIFF)

AND OTHERS (DEFENDANTS.)*

Procedure Code (1908), order V, rule 1 and 2 ; order IX, rule 13—Ex parte decree—Appearance of defendant in answer to a preliminary application not equivalent to appearance in answer to the plaint.

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Held that the fact that before the admission of a suit one of the proposed defendants had appeared by pleader on a miscellaneous application for his appointment as guardian *ad litem* to a minor defendant, did not absolve the court from the necessity of serving such defendant, when the suit was admitted, with copy of the plaint and notice of the date fixed for hearing.

THE facts of this case are fully stated in the judgement of the court.

Babu Lalit Mohan Banerji, for the appellant.

Mr. B. E. O'Connor and Pandit Mohan Lal Sandal, for the respondents.

TUDBALL and MUHAMMAD RAFIQ, J J.:—The appellant in this case was the defendant in a suit, in the court below, which was decreed *ex parte* against him. He applied under order IX, rule 13, of the Code of Civil Procedure to have the *ex parte* decree set aside on the ground that summons had not been served on him and therefore he was unable to appear and defend the suit. The application was against the appellant and his minor brother Har Bilas as partners of the firm Gulab Chand Har Bilas. Har Bilas was a minor, and when the plaint was filed there was an application by the plaintiff asking the court to appoint Gulab Chand as guardian of the minor. Notice of this application was issued to Gulab Chand. On the 27th of July, 1911, he filed a vakalatnama and objected to his appointment as guardian of the minor. His objection was allowed, and finally on the 1st of September, one Musamat Champo was appointed guardian. On the same day the suit was registered and summons was ordered to issue. Summons was issued to Gulab Chand, but it was returned unserved. Therefore the court passed an order that as there was a vakalatnama on the

* First Appeal No. 66 of 1912 from an order of Baijnath Das, Subordinate Judge of Agra, dated the 30th of March, 1912.

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record it was unnecessary to take any further step. The suit was decided *ex parte* against Gulab Chand. His application was rejected by the court below on the ground that a vakalatnama, dated the 27th of July, 1911, had been filed and showed that a vakil was appointed to defend the action filed and therefore service of summons was unnecessary after that. It is quite clear that on the 27th of July, 1911, the only matter pending was the miscellaneous matter relating to the appointment of a guardian. The suit was not registered and the pleader was appointed for that miscellaneous matter. It was the duty of the court to serve the summons after the suit had been registered. It is true that Gulab Chand knew that a suit had been instituted, but he was entitled to receive a copy of the plaint and be informed of the date fixed in order that he might be able to protect his rights. Therefore the order of the court below is wrong. We allow the appeal; set aside the *ex parte* decree as against the present appellant, and direct the court below to restore the suit to its original number and proceed to hear and determine it according to law. The costs of this appeal will abide the event.

Appeal allowed and cause remanded.

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*Before Sir Henry Richards, Knight, Chief Justice, Mr. Justice Banerji,
 and Mr. Justice Tudball.*

COLLECTOR OF MIRZAPUR (PLAINTIFF) v. BHAGWAN PRASAD
 AND OTHERS (DEFENDANTS).*

*Act No. IV of 1882 (Transfer of Property Act), sections 59, 100—Mortgage—
 Charge—Attestation—Document attested by one witness only.*

Held that a document which purported to be a mortgage, but which was attested by only one witness could not operate either as a mortgage or as creating a charge on immovable property within the meaning of section 100 of the Transfer of Property Act, 1882. *Shamu Patter v. Abdul Kadir Ravuthan* (1) referred to.

THE plaintiff in this case brought a suit for sale of immovable property on the basis of a document, alleged to be a mortgage, dated the 11th of July, 1900. The document purported to have

* First Appeal No. 52 of 1911 from a decree of Keshab Deb, Subordinate Judge of Jaunpur, dated the 26th of September, 1910.

(1) (1912) I. L. R., 35 Mad., 607.

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been executed by a number of persons who were stated to be the adult members of a joint Hindu family. It was in the form of a mortgage, but was attested by only one witness, instead of the two witnesses required by section 59 of the Transfer of Property Act, 1882. It was argued that nevertheless the document might be construed as creating a charge within the meaning of section 100 of the Act. The court of first instance held against the plaintiff on both these points and dismissed the suit. The plaintiff thereupon appealed to the High Court.

Mr. A. E. Ryves, for the appellant.

The Hon'ble Dr. *Sundar Lal* and Munshi *Haribans Sahai*, for the respondents.

RICHARDS, C.J., and BANERJI and TUDBALL, J.J.:—This appeal arises out of a suit for sale on foot of an alleged mortgage. The document is dated the 11th of July, 1900. It purports to have been executed by a number of persons who are stated to have been the adult members of a joint Hindu family. The present suit is brought against all the members of the family. The court below dismissed the plaintiff's suit. Hence the present appeal.

The appellant has to admit that owing to the fact that the document was attested by one witness only, the deed cannot operate as a mortgage, having regard to the provisions of section 59 of the Transfer of Property Act, which requires that a mortgage must be attested by at least two witnesses. It is, however, contended that the document, assuming it to have been executed by the persons who purported to do so, amounts to a charge under section 100 of the Transfer of Property Act and ought to be given effect to as such. It was further contended that in any event the plaintiff ought to have a personal decree against such persons as in fact executed the document.

The question as to how a mortgage must be attested was recently before their Lordships of the Privy Council in the case of *Shamu Patter v. Abdul Kadir Ravuthan* (1). In that case there were several witnesses to the document, but it appears that these witnesses had signed their names as such merely upon the admission of the executants and had not actually witnessed the signatures of the executants. It was held by the High Court of Madras that

(1) (1912) I.L.R., 35 Mad., 607.

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such "attestation" did not fulfil the requirements of section 59. On appeal their Lordships of the Privy Council took the same view and confirmed the decision of the Madras High Court. It is contended that their Lordships did not decide the question raised in the present appeal, namely that the document might be good as a charge although it fell short of fulfilling the necessary conditions of a mortgage. We cannot accept this view. The suit in that case was a suit for sale on an alleged mortgage, just as the present; and the present argument could not well have escaped the attention of their Lordships or of the Madras High Court. As a matter of fact we find from the report, at page 610, that it was contended before their Lordships of the Privy Council that the document must operate as a charge. We must take it that their Lordships considered and repelled the contention that a charge was created. We deem ourselves bound by the ruling of their Lordships in the case to which we have referred.

As to the other point we must point out in the first instance that the suit was not a suit for a personal decree. It was a suit to enforce payment of moneys alleged to be secured by mortgage by sale of the mortgaged property. Furthermore we find in the document itself the following clauses:—"In case of breach of the condition laid down in this document the said Babu Sahib shall have power to realize the entire amount mentioned in this document together with interest at the said rate from the hypothecated properties. The said Babu Sahib shall have no power to realize it from the persons and pay, et cetera, of us, the executants."

It is true that in the earlier part of the deed there are provisions that upon failure to pay certain instalments the mortgagee shall have power to realize the entire amount from the property hypothecated and also from "*other movable and immovable properties*." These are ordinary clauses which find their way into a great number of mortgages in these provinces. But, reading the document as a whole, we think that it was the intention of the parties that the mortgagee should rely upon his remedy against the mortgaged property and not against the person of the mortgagors. There is certainly no provision that a personal decree should be obtained. Under these

circumstances we consider that the decision of the court below was correct and ought to be confirmed.

We accordingly dismiss the appeal with one set of costs.

Appeal dismissed.

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Banerji.

JAI SINGH PRASAD (PLAINTIFF) v. SURJA SINGH AND OTHERS
(DEFENDANTS).*

Act No. IX of 1908 (Indian Limitation Act), section 31—Limitation—Mortgage—Suit on mortgage barred under Limitation Act of 1871—Mortgagee's rights not revived by present Act.

Held that section 31 of the Indian Limitation Act, 1908, cannot be construed as reviving rights already time-barred under the Limitation Act of 1871.

THIS was a suit for sale on a mortgage, dated the 19th of July, 1863. The money secured by the mortgage became payable on the 19th of June, 1864, and the suit was instituted on the 6th of August, 1910. The court of first instance dismissed the suit as being time-barred under the Indian Limitation Act of 1871. The plaintiff appealed to the High Court, relying on section 31 of the Limitation Act of 1908.

Munshi Jang Bahadur Lal, for the appellant.

Mr. A. H. C. Hamilton, for the respondents.

RICHARDS, C. J. and BANERJI, J. :—This appeal arises out of a suit on a mortgage, dated the 19th of July, 1863. The money secured by it became payable on the 19th of June, 1864. The present suit was instituted on the 6th of August, 1910. The court below has dismissed the suit as being barred by time. In our opinion this view was correct. Under the Limitation Act of 1871, which governed the present mortgage, a suit could only be brought within twelve years of the time the money became due, that is to say, within twelve years from the 19th of June, 1864. That Act contained no provision similar to article 147 of Act XV of 1877. It is, therefore, quite clear that before the passing of the last mentioned Act the claim under the bond in suit was barred by limitation. It is manifest from the provisions of section 2 of the

* First Appeal No. 422 of 1911 from a decree of Rama Das, Additional Subordinate Judge of Azamgarh, dated the 3rd of July, 1911.

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Act of 1877 that no right which had become barred under the Act of 1871, was thereby revived. No doubt for some time this High Court considered that a suit might be instituted in respect of mortgages, which were governed by the Act of 1877, at any time within sixty years, but their Lordships of the Privy Council have considered this view erroneous—see *Vasudeva Mudaliar v. Srinivasa Pillai* (1). This last mentioned decision, and the hardship which was supposed to follow in consequence, led to the introduction of section 31 of the present Act, which provides that, notwithstanding anything contained in it, or in the Limitation Act of 1877, a suit for sale may be instituted within two years from the date of its passing or within sixty years from the date when the money secured by the mortgage becomes due, whichever period expires first. The appellant relies upon this section, and contends that it is clear from the mention of sixty years that it was intended to apply to cases like the present, even though they were already barred by the provisions of the Act of 1871. We cannot agree with this contention. It is impossible to hold that by the introduction of this section the Legislature intended to revive rights which had already become long since barred under the Act of 1871. The section expressly refers only to the provisions of Act XV of 1877 and not to any earlier Act. It is quite clear that if the plaintiff had instituted the suit whilst Act XV of 1877 was still in force it would have been time-barred. The enactment of section 31 certainly can give him no higher title. We dismiss the appeal with costs.

Appeal dismissed.

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January, 23.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Banerji.

DURGA KUNWAR AND OTHERS (DEFENDANTS) v KALI CHARAN

(PLAINTIFF).*

Sale—Covenant for title—Claim made against purchaser compromised before suit brought—Right of purchaser to claim indemnity from covenantor.

The purchaser of immovable property concerning which the seller has covenanted to indemnify the purchaser in the event of the title proving defective is not bound to wait until a suit is brought and he is deprived of the property by reason of a decree passed therein, but, if a claim which the purchaser has

* First Appeal No. 346 of 1911 from a decree of Baijnath Das, Officiating Subordinate Judge of Bareilly, dated the 19th of August, 1911.

(1) (1907) I. L. R., 30 Mad., 426.

substantial reason to believe to be valid is brought against him, he may, after notice to the covenantor, compromise such claim and sue the covenantor on his covenant to recover the amount paid by him to effect the compromise. *Smith v. Compton* (1) referred to.

THE facts of this case are fully stated in the judgement of the Court.

Babu *Jogindro Nath Chaudhri* and Babu *Sital Prasad Ghosh*,
for the appellants

The Hon'ble Dr. *Sundar Lal* and Dr. *Satish Chandra Banerji*,
for the respondent.

RICHARDS, C. J. and BANERJI, J. :—This appeal arises out of a suit in which the plaintiff claims damages for breach of covenants for title contained in a sale deed, dated the 12th of October, 1889. The court below has given the plaintiff a decree for Rs. 2,900, being considerably less than the amount claimed. At the time of the alleged sale the property mentioned in the plaint, together with other property was in the hands of the Court of Wards, and the sale deed was executed by the Court of Wards. It has not been contended, and in our opinion could not be contended, that the persons entitled to the property sold were not liable upon foot of the covenants given by the Court of Wards, assuming that there was a breach. The sale deed contained the ordinary covenants for title, including a covenant that the vendors took upon themselves "the responsibility that the property should be free from all debts, claims and liabilities".

In the present suit we are concerned with a village called Mirpur Harriapur, which was one of the items of property comprised in the deed already mentioned. The title to this village briefly is as follows:—One Jaswant Singh and others were the owners of it. Jaswant Singh mortgaged it to Brij Kishore, who brought a suit for sale and obtained a decree. Brij Kishore then died and his widow Durga Dei continued the proceedings, had the property sold, and purchased it herself. On the 9th of December, 1879, Durga Dei sold it to Durga Kunwar. Durga Kunwar was the widow of Lakhan Singh, who had a brother, Har Singh, and it is admitted that the two brothers were joint. Some time after the sale by the Court of Wards claims were made to the property, the subject matter of the sale. The claimants

(1) (1832) 3 B. and A., 407.

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alleged that they were the reversioners to the estate of Brij Kishore; that Durga Dei as his widow, in the absence of legal necessity, had no power or authority to sell property to Durga Kunwar, and that upon Durga Dei's death, which took place on the 8th of June, 1905, they became entitled to the property.

It is an admitted fact that a considerable amount of litigation took place with respect to the claim so made, with the result that in respect of one of the villages sold by Durga Dei, the claim of one Kishan Chand, one of the claimants, was decreed. We mention this to show that there was a serious claim made against the vendee under the sale deed of the Court of Wards. In due course a claim was made against Kali Charan, the purchaser from the Court of Wards, in respect of the village Mirpur Harriapur. The plaintiff at once sent notice to Durga Kunwar, setting forth clearly and distinctly the nature of the claim that had been made, called attention to the success of Kishan Chand in the other litigation, and required Durga Kunwar to give such information as would enable Kali Charan to defend the suit which he anticipated would be brought against him. No attention of any kind was paid to this notice. Subsequently Kali Charan compromised with the claimants and paid to Kishan Chand a sum of Rs. 4,750. He gave notice of this compromise to Durga Kunwar, but again no notice was taken and then the present suit was instituted.

We are quite satisfied that the compromise was a genuine compromise. We are also quite satisfied that the two notices, although addressed to Durga Kunwar alone, reached all the defendants, who constituted a joint Hindu family. In the written statement, which was put in by Gajraj Singh, Mahitab Singh and Musammatt Dharam Kunwar, it is not disputed that the notice was sent.

Two main points have been argued in the present appeal. It was first contended that, inasmuch as Kali Charan was never actually dispossessed, the plaintiff cannot recover, and that he had no right to enter into the compromise, and that he ought in any event to have waited until a suit was actually instituted. The second point was that the property really belonged to Durga Kunwar and did not belong to the other defendants, and that accordingly the suit should be dismissed, at least, as against them.

We shall deal with the second point first. The property was purchased in the name of Durga Kunwar, but it was during the life-time of her husband, who, admittedly, was joint with his brother, the father of the other defendants. The sale deed in favour of Kali Charan purports to be made on behalf of the other defendants as well as Durga Kunwar. In the written statement filed on behalf of the defendants other than Durga Kunwar, it is admitted that the property was sold by them, but it is alleged that they were only selling such title as had been got from Durga Dei. They also admitted in paragraph 4 that they were the purchasers from Durga Dei, and it was never expressly alleged in the written statement that Mirpur Harriapur belonged exclusively to Durga Kunwar. We therefore can pay no attention whatever to the statement of the pleader in the *rubkar* of the 6th of June, 1911, that the property was exclusively hers. In any event we think that, inasmuch as the property was sold as belonging to the joint family, the joint family are liable at the suit of the purchaser assuming that there was a breach of the covenant.

We now deal with the question as to whether or not Kali Charan was bound to wait until a suit was brought or whether he was entitled, after giving due notice, to enter into such compromise as he thought fit and was reasonable. A very similar question arose in the case of *Smith v. Compton* (1). In that case a suit was brought against the vendee, who compromised the suit before judgement, paying £550. He then brought a suit against the covenantors for breach of their covenant for title. It was contended that the plaintiff could not recover the money which he had paid by way of compromise, because he had not given notice to the defendants, and accordingly that he was not entitled to recover the sum which he paid for the compromise for defending the action up to the time of the compromise. Lord TENTEDEN, C.J., said:

"I am of opinion that the plaintiff is entitled to recover the money which he paid by way of compromise, because he had given notice in such a case as this to the defendants, and he was not bound to indemnify to show that the plaintiff had not been bound to pay the money not to the amount of the compromise, but to the amount of the sum which he paid for defending the action up to the time of the compromise."

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him. That was not proved here, and we cannot assume it. As to the costs, the plaintiff here had a right to claim an indemnity, and he is not indemnified unless he receives the amount of the costs paid by him to his own attorney."

It will thus appear that the learned Chief Justice considered that the plaintiff was entitled to compromise the action and to claim the amount for which he compromised, together with the costs of defending the suit. PARKE, J., says:—

"I am of the same opinion. The effect of notice to an indemnifying party is stated by BULLER, J., in *Duffield v. Scott*, 3 T.R., 374:—'The purpose of giving notice is not in order to give a ground of action, but if a demand be made, which the person indemnifying is bound to pay, and notice be given to him, and he refuse to defend the action, in consequence of which the person to be indemnified is obliged to pay the demand, that is equivalent to a judgement and estops the other party from saying that the defendant in the first action was not bound to pay the money.'"

The only distinction that can be drawn between the case cited and the present, is that the plaintiff in the present case settled what he considered to be a claim which he could not resist without waiting until a suit was actually brought. We can see no reason or principle why if a person entitled to an indemnity is competent to compromise a suit which is brought, he is not equally competent to settle the dispute before suit. If he has given due notice to the indemnifying party, the indemnifying party, on the authority of the case to which we have referred, is not entitled to come forward and say that the compromise was not a fair and reasonable one.

In any event the court below has in our judgement given very good reasons for holding that the compromise in the present case was a reasonable and fit one. Furthermore, it was never alleged by the defendants that they were in a position to show that Durga Dei had authority to sell the property in question absolutely, or that there was any other claimant who could come forward, and it has been admitted by the learned advocate for the plaintiff that he has no further claim against the defendants upon foot of the covenants contained in the sale deed from the Court of Wards, so far as the village of Mirpur Harriapur is concerned.

We accordingly dismiss the appeal with costs.

Appeal dismissed.

REVISIONAL CRIMINAL.

1913

January, 31

Before Mr. Justice Tudball.

EMPEROR v. DINA NATH AND ANOTHER.*

Act No. VI of 1882 (Indian Companies Act), section 74—Penalty—Criminal Procedure Code, section 260—Summary jurisdiction—Power to try summarily offences under the Indian Companies Act.

Held that there is nothing in law to prevent a Magistrate from trying summarily offences under the Indian Companies Act, 1882.

Held also, that the penalty provided by section 74 of the Indian Companies Act, 1882, is a fixed and not a maximum penalty. *Queen Empress v. Moore* (1) referred to.

Dina Nath, Kashi Ram, Hazari Lal and Devi Dat were directors of a Company known as the Union Indian Sugar Mills Company, Limited, Cawnpore. On the complaint of the Registrar of Joint Stock Companies these four persons were placed on their trial on a charge under section 74 of the Indian Companies Act, 1882, no balance sheet having been filed with the Registrar within the time fixed or within the extension allowed by him; the offence being that of knowingly and wilfully authorizing or permitting the default. The case was tried summarily by a Magistrate of the first class, who acquitted Devi Dat and imposed a penalty of Rs. 50 on each of the other directors. The three directors who had been convicted applied in revision to the High Court.

Mr. W. Wallach and Babu Vikramajit Singh, for the applicants.

The Assistant Government Advocate (Mr. R. Malcomson), for the Crown.

TUDBALL J :—This matter and Revisions Nos. 1012 and 1013 of 1912, arise out of the following circumstances :—

The three applicants Lala Dina Nath, L. Kashi Ram and L. Hazari Lal, and one Lala Devi Dat are the directors of the Union Indian Sugar Mills Company, Ltd., Cawnpore. They were placed upon their trial on the complaint of the Registrar of Joint Stock Companies on a charge under section 74 of the Companies Act, VI of 1882, no balance sheet having been filed with the Registrar within the time fixed or within the extension allowed by him; the

* Criminal Revision No. 1011 of 1912 from an order of Austin Kondall, Sessions Judge of Cawnpore, dated the 25th of November, 1912.

(1) (1893) I. L. R., 20 Cal., 676.

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offence being that of knowingly and wilfully authorizing or permitting the default mentioned above. The case was tried summarily by a Magistrate of the first class, who acquitted Lala Devi Dat and imposed a penalty of Rs. 50 on each of the other directors. The three latter have come here in revision. A great deal has been said about the merits of the case, but in view of the order which I am going to pass I abstain from making any remarks thereon.

It is urged that the Magistrate had no power to try the case summarily. With this I cannot agree. Under section 260 of the Code of Criminal Procedure a Magistrate has power to try summarily all offences not punishable with death, transportation or imprisonment for a term exceeding six months. The word 'offence' is defined in the Code as "any act or omission made punishable by any law for the time being in force." Section 5 of the Code lays down that "All offences under the Indian Penal Code shall be investigated, inquired into, tried and otherwise dealt with according to the provisions laid down in the Code of Criminal Procedure." Clause (2) of the section lays down that "All offences under any other law shall be similarly dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or the place of investigating, inquiring into, trying or otherwise dealing with such offences." There is nothing in the Companies Act which lays down that a Magistrate having summary powers shall not try an offence under that Act in a summary manner. It is true that under section 252 all offences under the Act may be tried by any Magistrate of the first class unless the period of imprisonment to which the offender is liable exceeds that which such officer is competent to award under the law for the time being in force in the place where he is employed. When the period of imprisonment provided by the Act exceeds the period that may be awarded by such officer, the offender shall be committed for trial to the Court of Session. There is nothing in this portion of the section which takes away the Magistrate's power to try summarily cases within his jurisdiction, nor does the second clause of the section take away any such power. As a matter of fact a Presidency Magistrate has power to try all cases under the Act in a summary way irrespective of the sentence he may impose.

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Section 262 of the Code of Criminal Procedure lays down the limit to the sentence of imprisonment which may be awarded at a summary trial. There is nothing in chapter XXII which limits the amount of fine which may be imposed in a summary trial ; the sections which deal with appeals in the Code, however, show that a sentence of fine exceeding Rs. 50 is an appealable sentence. But though it cannot be said that the Magistrate has been guilty of any illegality in trying the case summarily, there are very good grounds why he should not have done so. In the first place the penalty which may be imposed under section 74 is one of Rs. 1,000 *neither more nor less*. An examination of the Act would show that everywhere (with two exceptions) where the Act lays down a penalty for an offence in the shape of fine it clearly lays down a maximum, which is not to be exceeded, and sections 25, 55, 57 and 66 are all instances of this. In section 66 (1) any Limited Company which does not paint or affix its name in the manner directed by the Act, is held liable to a penalty not exceeding Rs. 50. But in the last clause of the same section it is distinctly laid down that the Director, Manager or Officer of the Company, who is guilty of the act mentioned in this clause, shall be liable to a penalty of Rs. 1,000. Similarly in section 74 it is laid down that a Director or Manager of a Company shall be liable to a penalty of Rs. 1,000. If the Legislature had intended that in these two cases there should be a maximum penalty and not a fixed penalty, it would have used the same language as it has used in other sections of the Act, just in the same way as in the Indian Penal Code it has been laid down that sentence shall not be more or less than a fixed amount, clearly showing that the court should exercise its discretion as to the sentence to be imposed. The only decision which is on all fours with the present case is the case of *Queen Empress v. Moore* (1). That was under section 35 of the Companies Act, which has since been repealed. That section ran as follows :—“ If a share-warrant is issued without being duly stamped, the company issuing the same, and also every person who at the time when it is issued is the managing Director or Secretary or other principal officer of the Company, shall forfeit the sum of Rs. 500.” It was in that case held that the forfeiture was a penalty and that a forfeiture of Rs. 500 was

(1) (1893) I. L. R., 20 Cal., 676.

the fixed penalty laid down by the Statute. It seems to me clear that the penalty laid down in section 74 is also a penalty fixed by Statute and the Magistrate was not competent to inflict any lesser penalty. If the Magistrate had inflicted this penalty, it is clear that the person convicted would have had a right of appeal. The case is one in which a great deal of correspondence has been put forward and is by no means of that simple character to which a summary trial is intended to be restricted. In deciding whether or not he will try a case summarily it is for the Magistrate to exercise a wise discretion and ordinarily he ought to restrict such trials to simple cases. In my opinion the present case was one in which, even if it had been tried summarily and a proper penalty imposed, an appeal would have been of very little use to the persons convicted, as a great mass of important evidence is not on this record. It seems to me essentially one of those cases which the Magistrate should have tried in an ordinary way, duly recording the evidence. The case has not been properly tried and ought to be tried *de novo*.

It is urged on behalf of Lala Devi Dat, who was acquitted by the Magistrate, that the order of acquittal should not be set aside, as the Magistrate has found that Devi Dat had done his best to bring about the filing of the balance sheet. This is really a point on the merits of the case. Without full evidence before me it is impossible to say whether Devi Dat is innocent or guilty, nor would it be right for me to express any opinion, especially as I am ordering a new trial. The case in my opinion has not been satisfactorily tried and ought to be tried *de novo*. I therefore set aside the convictions and sentences on Lala Dina Nath, Lala Kashi Ram and Lala Hazari Lal. I set aside the acquittal of Lala Devi Dat and order the case to be tried *de novo* by some Magistrate, other than the Magistrate who has decided the case, to whom the District Magistrate may think it fit to send it.

Order set aside.

APPELLATE CIVIL.

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February, 3.

Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

G. J. BOWER (JUDGEMENT-DEBTOR) v. IMPERIAL BANK LIMITED (DECREE-HOLDER).[#]

Act No. VI of 1882 (Indian Companies Act), section 169—Company—Winding up—Appeal—Notice.

Held that the provisions of section 169 of the Indian Companies Act, 1882, as to service of notice of appeal are imperative, and if the requisite notice has not been served within three weeks from the date of the order complained of and the time for service has not been extended by the appellate court, the appeal cannot be heard.

THIS was an appeal from an order passed in the matter of the winding up of a company in the following circumstances. The respondent Bank was being wound up. The appellant was one of the contributories. The winding up was in the court of the Additional District Judge of Aligarh, where, it appears, the appellant took an objection on the ground that the decree passed against him in favour of the Bank was time-barred. The objection was disallowed. The decree-holders applied to enforce the order of the court under section 167 of the Companies Act and the matter went to the court of the Second Additional Judge of Meerut. There the appellant raised further objections as well as the objection as to limitation; but they were disallowed.

The contributory thereupon appealed to the High Court.

Babu Jogindro Nath Chaudhri, for the appellant.

Babu Durga Charan Banerji and Pandit Ramu Kant Malaviya, for the respondents.

TUDBALL and MUHAMMAD RAFIQ, J.J. :—This is an appeal from an order of the court below passed under the following circumstances. The respondent Bank is being wound up. The appellant is one of the contributories. The winding up is in the court of the Additional District Judge of Aligarh, where, it appears, the appellant took an objection on the ground that the decree passed against him in favour of the Bank was time-barred. The objection was disallowed. The decree-holders applied to enforce the order of the court under section 167 of the Companies Act and the matter went to the court of the Second Additional Judge of Meerut. There the

[#] First Appeal No. 122 of 1912 from an order of Mubarak Husain, Second Additional Judge of Meerut, dated the 28th of June, 1912.

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appellant raised further objections as well as the objection as to limitation; but they were disallowed. The appellant has come up in appeal to this Court.

A preliminary objection is taken that notice under section 169 of the Act has not been given and that therefore the appeal cannot be heard. It is argued on behalf of the appellant that the order which he seeks to have upset on appeal is not an order which was made in the matter of the winding up of the Company. With this we cannot agree. It is clearly and distinctly an order which was given in the matter of the winding up of the Company. If it is not, we do not know under what law he comes to this Court on appeal. Under the last clause of section 169 it was obligatory on him to give notice within three weeks, which he has failed to do. Therefore we cannot hear the appeal. On behalf of the appellant Mr. Chaudhri asked for an extension of time. The order of the court below was passed on the 28th of June, 1912, and this appeal was filed on the 7th of August, 1912. No good cause is shown why we should extend the time, and we see no reason to accede to the request. The preliminary objection prevails and this appeal is dismissed with costs.

Appeal dismissed.

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February, 4.

Before Mr. Justice Sir Harry Griffin and Mr. Justice Chamier.

BADRI NARAIN (DEPENDANT) v. KUNJ BIHARI LAL (PLAINTIFF) *

Execution of decree—Limitation—Suit for sale on a mortgage—Decree payable by instalments—Civil Procedure Code (1882), section 258—Civil Procedure Code (1909), order XXI, rule 2; order XXXIV, rule 5—Act No. IX of 1908 (Indian Limitation Act), schedule 1, article 181.

On a compromise in a suit for sale on a mortgage a decree followed providing that the sum found due on the mortgage (Rs. 1,374), with interest at a certain rate, should be paid by instalments of Rs. 100 a year, along with the interest then due. Payments were to be made by the end of Jeth in each year, beginning with Jeth 1957 Fasli (June 1900) and it was provided that if default were made for three years in succession in the payments and interest, the decree-holder would be at liberty to recover at once the whole amount payable under the decree, that is, to apply for an order absolute for sale and execute the same. No payment was made in 1900 or 1901, but in June 1902, just before the end of Jeth 1959 Fasli, the judgment-debtor paid up all that was

* Second Appeal No. 694 of 1911 from a decree of H. Dupernex, District Judge of Mainpuri, dated the 22nd of February, 1911, confirming a decree of Banko Behari Lal, Subordinate Judge of Mainpuri, dated the 10th of September, 1910.

due on account of the first three years. He made no payment in 1903, but in June 1904 he paid up all that was due up to the end of Jeth 1960 Fasli (June 1903.) No payment was made in 1905, but in June 1906 he paid the instalment and interest which he ought to have paid in Jeth 1961 Fasli (June 1904). This payment was covered by the proviso to section 20 (1) of the Limitation Act. The only other payment made was a small sum on account of interest in July 1909. The decree-holder applied for an order absolute for sale on the 3rd of August, 1909.

Held that the first three consecutive defaults were in 1905, 1906 and 1907, and that the decree-holder's application was in time applying article 181 of the first schedule to the Indian Limitation Act, 1908.

The following cases were referred to :—*Oudh Behari Lal v. Nageshar Lal* (1), *Kishan Singh v. Aman Singh* (2), *Roshan Singh v. Mata Din* (3), *Chunni Lal v. Harnam Das* (4), *Shankar Prasad v. Jalpa Prasad* (5), *Ajudhia v. Kunjal* (6), *Mon Mohun Roy v. Durga Churn Goode* (7) and *Kashiram v. Pandu* (8).

THE facts of this case were as follows :—

A decree on a compromise was passed on the 11th of September, 1899, to the following effect :—“ Rs. 1,374 with interest at As. 10 per cent. per mensem shall be paid by instalments of Rs. 100 a year. *Agar mutawattir tin sal tak ada na ho ya kuch baqi rahe to digridar ko ikhtiar hai* etc., etc”. The first instalment was due in June, 1900. In June, 1902, Rs. 605 were paid on account of the instalments, principal and interest, due for 1900, 1901, and 1902. No payment was made in 1903. In June, 1904, Rs. 181 were paid, which were credited by the decree-holder towards principal and interest of the instalment for 1903. The decree-holder alleged a further payment of Rs. 173-1-0 in June, 1906, which the decree-holder credited towards the instalment due for 1904. This payment was not admitted by the opposite party, who was a representative of the judgement-debtor. The present application for the preparation of a final decree was made on the 3rd of August, 1909, and the opposite party objected that the application was barred by limitation. The court below held that the alleged payment of June, 1906, was proved to have been made by the opposite party but that it had not been certified to the court. Both the courts below disallowed the objection as to limitation. The judgement-debtor's representative appealed.

(1) (1890) I.L.R., 13 All., 278.

(2) (1894) I.L.R., 17 All., 42.

(3) (1903) I.L.R., 26 All., 36.

(4) (1898) I.L.R., 20 All., 302.

(5) (1894) I.L.R., 16 All., 371.

(6) (1908) I.L.R., 30 All., 123.

(7) (1888) I.L.R., 15 Calc., 502.

(8) (1902) I.L.R. 27 Bom., 1.

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Babu Piari Lal Banerji, for the appellant :—

The payment of 1906 should not be recognized at all as it was not certified to the court executing the decree. Under order XXI, rule 2, of the Code of Civil Procedure the alleged payment could not be inquired into even for the purpose of seeing whether the present application was barred by limitation. Under the old Code an uncertified payment could be recognized for the purpose of such inquiry; *Roshan Singh v. Mata Din* (1). The change in the law has been noticed and given effect to in the case of *Kutab-ullah Sarkar v. Durga Charan Rudra* (2). The fact that the alleged payment was made while the old Act was in force will not make the old Act applicable. The court has now to decide the question with reference to the procedure now applicable. It cannot be said that by the alleged payment any substantive right was acquired. The decree-holder could not say that by the payment he acquired any right which was not affected by the repeal of the old Act. It is true that this Court has held that the new Code of Civil Procedure would not affect any right acquired under the old Code; *Kaunsilla v. Ishri Singh* (3). But that was a very different case. Under the law as it stood in the old Code a decree-holder who had obtained a decree on foot of a mortgage was not fettered by the twelve years' rule of limitation and he therefore did acquire this substantive right: to quote the words of KNOX, J.:—"the decree-holder had the remedy to enforce his right so to speak till the end of time" and it was held therefore that section 48 of the new Code would not affect mortgage decrees passed before the new Code came into force. No such consideration arose in the present case, as the question was merely one of procedure, in which no one had a vested right. If the payment of 1906 was not recognized, the application was obviously time-barred, because there were three consecutive defaults in 1904, 1905 and 1906 and therefore the right to apply accrued in June, 1906, and the application should have been made in June, 1909. Even if the payment of June, 1906, were recognized, still the application was time-barred, because the payment made in June, 1906, had not the effect of paying in full the instalment due for June, 1906, and did not prevent the year 1906 from being a

(1) (1904) I.L.R., 26 All., 86. (2) (1912) 16 C. W. N., 396.

(3) (1910) I.L.R., 32 All., 499.

year of default, and therefore there were three consecutive defaults in 1904, 1905 and 1906. No payment made in 1906 could wipe away the default of 1904 and 1905 which had already occurred, but if the payment had been made in full for the instalment due in 1906 it might have prevented a third consecutive default and thus have prevented the accrual of the right to apply.

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Dr. Satish Chandra Banerji, for the respondent :—

The first point to be considered is whether the application made for a final decree for sale under order XXXIV, rule 5, of the Code of Civil Procedure is an application for execution or an application in the suit itself. If it is an application in the suit itself then the provisions of order XXI, rule 2, will not apply. Under the new Code an application under order XXXIV, rule 2, is not an application in the suit itself; *Sita Ram v. Sheo Raj Singh* (1). Even if the matter is treated as a matter in execution order XXI, rule 2, of the new Code would not apply, as the payments were made while the old Code was in force and uncertified payments could under that Code be recognized for the purpose of saving limitation; *Kaunsilla v. Ishri Singh* (2). Whether, therefore, the old Code applies or the new, order XXI, rule 2, has no application. As regards the proper construction of the decree as the payment was made in 1906 and was accepted by the decree-holder, the right to apply was waived. It was for the decree-holder to insist or not on punctual payments and if he chose to show favour to the judgement-debtor and accepted an overdue instalment, the judgement-debtor could not complain. The three consecutive defaults were made in 1905, 1906 and 1907. The application was made within time in 1909. He cited *Shankar Prasad v. Jalpa Prasad* (3), *Bhagwan Das v. Janki* (4), *Ajudhia v. Kunjal* (5), *Maharaja of Benares v. Nand Ram* (6).

Babu Piari Lal Banerji, in reply :—

The present matter is one in execution, as after the decree *nisi* had been passed under the old Code, the suit came to an end and therefore it could not be said, that by the new Code a suit which

(1) (1910) 7 A.L.J., (Notes) 65.

(4) (1905) I.L.R., 28 All., 249.

(2) (1910) I.L.R., 32 All., 499.

(5) (1908) I.L.R., 30 All., 123.

(3) (1894) I.L.R., 16 All., 371.

(6) (1907) I.L.R., 29 All., 431.

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had terminated was revived. He discussed *Ganga Singh v. Banwari Lal* (1) and *Amlook Chand Parrack v. Sarat Chunder Mukerjee* (2).

GRIFFIN and CHAMIER, JJ. :—The only question in this appeal is whether the respondent's application for a decree absolute for the sale of mortgaged property was made within time. The decree *nisi*, which was passed in 1899 upon a compromise between the parties, provided that Rs. 1,374-0-0 with interest at a certain rate should be paid by instalments of Rs. 100 a year along with the interest then due. Payments were to be made by the end of Jeth in each year beginning with Jeth 1957 Fasli (June 1900), and it was provided that if default were made for three years in succession in the payments and interest, the decree-holder would be at liberty to recover at once the whole amount payable under the decree, i.e., to apply for an order absolute for sale of the property and execute the same.

No payment was made in 1900 or in 1901, but in June 1902, just before the end of Jeth 1959 Fasli, the appellant paid up all that was due on account of the first three years. He made no payment in 1903, but in June 1904 he paid up all that was due up to the end of Jeth 1960 Fasli (June 1903). No payment was made in 1905, but in June 1906 he paid the instalment and interest which he ought to have paid in Jeth 1961 Fasli (June 1904). It has been found that this payment is covered by the proviso to section 20 (1) of the Limitation Act. The only other payment made was a small sum on account of interest in July 1909 which has no bearing upon the question which we have to decide.

The appellant contends that the payment made in June 1906 not having been certified cannot be recognized by the court in view of the provisions of order XXI, rule 2. To this the respondent replies that that rule is not applicable, inasmuch as the application for a decree absolute is not an application for execution and the court is not being asked to execute a decree but only to continue the suit. The payment in question was made before the passing of the new Code of Civil Procedure. Under the old Code it was, no doubt, held by this Court that an application for an order absolute was a proceeding in execution of a decree—see *Oudh*

(1) (1911) 8 A.L.J., 1229.

(2) (1911) I.L.R., 38 Cal., 913.

Behari Lal v. Nageshar Lal (1)—but it was held also in several cases that although an uncertified payment could not be recognized as a payment or adjustment of a decree by a court executing a decree, it was available to a decree-holder for the purpose of meeting a plea of limitation—see for example *Kishan Singh v. Aman Singh* (2) and *Roshan Singh v. Mata Din* (3). These rulings are binding upon us. The right which the respondent had before the passing of the new Code of Civil Procedure, to use the payment made in 1906 for this purpose, cannot have been taken away from him by the passing of the Code. We are therefore bound to recognize the payment when dealing with the question of limitation.

We have to ascertain what article of the Limitation Act is applicable and when time began to run against the respondent. In *Chunni Lal v. Harnam Das* (4) article 179, schedule II, to the Limitation Act of 1877 (article 182 of schedule I to the present Act) was held to govern an application for an order absolute for sale of mortgaged property. But the decree *nisi* in that case was in the common form, whereas in the present case we have an instalment decree containing a provision that the whole amount of the decree may be demanded on the occurrence of three consecutive defaults, and it is difficult to see how any of the provisions of the third column of article 182 of the present Act can be applied to such a case. It would appear that the article applicable is No. 181. This article corresponds with article 178 of the Act of 1877, which has been held in many cases to govern applications in execution proceedings to which for one reason or another article 179 of that Act could not be applied. If, as we think, article 181 of the present Act is applicable, the right to apply for an order absolute accrued to the appellant on the occurrence of the third consecutive default.

The respondent relies upon the decisions in *Shankar Prasad v. Jalpa Prasad* (5), *Ajudhia v. Kunjal* (6) and other like cases as authority for the proposition that the respondent was not bound to take out execution, i.e., apply for an order absolute, on the happening of the third consecutive default, though he was at

(1) (1890) I.L.R., 13 All., 278.

(2) (1894) I.L.R., 17 All., 42.

(3) (1903) I.L.R., 26 All., 36.

(4) (1898) I.L.R., 20 All., 302.

(5) (1894) I.L.R., 16 All., 371.

(6) (1908) I.L.R., 30 All., 123.

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No payment was made in 1900 or in 1901, but in June 1902, just before the end of Jeth 1959 Fasli, the appellant paid up all that was due on account of the first three years. He made no payment in 1903, but in June 1904 he paid up all that was due up to the end of Jeth 1960-Fasli (June 1903). No payment was made in 1905, but in June 1906 he paid the instalment and interest which he ought to have paid in Jeth 1961 Fasli (June 1904). It has been found that this payment is covered by the proviso to section 20 (1) of the Limitation Act. The only other payment made was a small sum on account of interest in July 1909 which has no bearing upon the question which we have to decide.

The appellant contends that the payment made in June 1906 not having been certified cannot be recognized by the court in view of the provisions of order XXI, rule 2. To this the respondent replies that that rule is not applicable, inasmuch as the application for a decree absolute is not an application for execution and the court is not being asked to execute a decree but only to continue the suit. The payment in question was made before the passing of the new Code of Civil Procedure. Under the old Code it was, no doubt, held by this Court that an application for an order absolute was a proceeding in execution of a decree—see *Oudh*

(1) (1911) 8 A.L.J., 1229.

(2) (1911) I.L.R., 88 Cal., 913.

are those which occurred in 1905, 1906 and 1907. Consequently his application for a decree absolute made in August, 1909, must be held to have been made within time. We dismiss this appeal with costs.

Appeal dismissed.

Before Mr. Justice Sir Harry Griffin and Mr. Justice Chamiar
SHIDA ALI (PLAINTIFF) v. PHULLO AND ANOTHER (DEFENDANTS).*

Act No. IX of 1908 (Indian Limitation Act), schedule I, article 132—*Limitation—Malikana—Suit for malikana—Decree asked for against property charged*

Where a plaintiff sued for the recovery of *malikana* for 11 years and claimed a decree against the property on which the *malikana* was charged, it was held that the suit was within time having regard to article 132 of the first schedule to the Indian Limitation Act, 1908. *Kallar Roy v. Ganga Pershad Singh* (1) distinguished.

THE facts of this case were as follows :—

The plaintiff sued on the allegations that in mauza Razzak the owners of *muafi* rights were bound to pay to the owner zamindari rights Rs. 12-8-0 per cent. of cash rental, $2\frac{3}{4}$ seer maund of the grain rental, and Rs. 17-3-0 a year as *bhent* (present) that these dues were a charge on the *muafi* rights; that in mauza *safed* of that mauza there was a *patti* of 5 biswas; that the defendant was a *muafidar* of the whole of that and a zamindar of 20 biswa 2 biswansis 10 kachwansis of it; that the plaintiff was a zamindar of one biswa 17 biswansis 10 kachwansis and entitled to recover the aforesaid dues in respect of that; that the defendant had not paid him any thing for the years 1305 *fasli* to 1316 *fasli* hence this suit for Rs. 625-6-4 as principal, and Rs. 498-8-0 as interest, to be realized from the defendant's 85 biswas. The defendants pleaded that the suit was not cognizable by the Court; that the amount of *bhent* was not Rs. 17-8-0 per annum but that the dues payable were not a charge on the land; that the dues in question were payable by the holder of the whole of the 20 biswa zamindari rights jointly to the holders of the whole of the 85 biswa *muafi* rights, therefore the suit against the defendants alone was not maintainable and was bad for non-joinder of parties; that the plaintiff himself owned *muafi* right over five biswas till

*First Appeal No. 248 of 1911 from a decree of Pitambar Joshi, Second Additional Judge of Moradabad, dated the 18th of March, 1911.

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21st of December, 1908, on which date $4\frac{1}{2}$ biswas were auctioned off and half a biswa was still held by him; that a large part of the claim is barred by limitation; that the amounts of rental and quantities of zamindari rights as mentioned by the plaintiff were wrong, and that the claim about interest was wrong. The court below dismissed the suit. The plaintiff appealed.

Mr. S. A. Haidar, for the appellant, relied on *Hurmuzi Begum v. Hirdaynarain* (1), *Churaman v. Balli* (2), *Lallubhai v. Naran* (3) and *Jagarnath Pershad Singh v. Kharach Lal* (4) and submitted that the *malikana* being a charge on property the whole amount was recoverable. Article 132 of the Limitation Act was applicable.

The Hon'ble Dr. Tej Bahadur Sapru, for the respondents, contended that the claim, except that for three years, was barred by limitation. He relied on *Kallar Roy v. Ganga Pershad Singh* (5).

Mr. S. A. Haidar was not heard in reply.

GRIFFIN and CHAMIER, JJ.:—This is a plaintiff's appeal arising out of a suit to recover eleven years' arrears of *malikana*. The plaintiff asked for a decree against the property, on which, he says, the *malikana* allowance was chargeable. The court below has given him a decree for Rs. 57-3-4 only. In appeal to this Court it is pointed out, on behalf of the appellant, that the court below, in making its calculation, has made an obvious mistake and that the sum due to the plaintiff appellant on the basis adopted by the court below should be Rs. 262-12-5, to which should be added Rs. 18-0-0 on account of *bhent*. The defendants respondents have filed objections, and it is contended on their behalf that the suit is barred by time. Reliance is placed on *Kallar Roy v. Ganga Pershad Singh* (5). In that case the learned Judges refused to apply the provisions of article 132 of the Limitation Act, the reason being that in the particular case before them the plaintiff had not asked for a decree against the property chargeable with *malikana*. In the present case the plaintiff asked for a decree against the property, although the court below has not granted it. The explanation to article 132 leaves no doubt as to the period

(1) (1880) I. L. R., 5 Calc., 921. (3) (1882) I. L. R., 6 Bom., 719.

(2) (1887) I. L. R., 9 All., 591. (4) (1905) 10 O. W. N., 151.

(5) (1905) I. L. R., 33 Calc., 998.

of limitation applicable to suits of this nature. We allow the appeal so far that in lieu of the decree for Rs. 57-3-4 passed by the court below we substitute a decree for Rs. 280-12-5. Parties will pay and receive costs in proportion to failure and success in both courts. The cross objections are dismissed with costs.

Appeal allowed.

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February, 7.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Banerji.

ANANT DAS (DEFENDANT) v UDAI BHAN PARGAS (PLAINTIFF).*

Civil Procedure Code (1908), section 11—Res judicata—Two suits, one judgement and two decrees—Two appeals of which one abates before the other is heard.

A plaintiff instituted, on the same day and in the same court, two suits, in each of which the claim was for a declaration that he was the *mahant* of a certain *math*. The one was against defendant *A* only, the other against defendants *A* and *S*. Both suits were decided by a single judgement, but a separate decree was framed in each. In the former suit *A* appealed. In the latter *S* appealed, but *A* did not. Pending *A*'s appeal *S* died and his appeal abated and the judgement in the case became final. *Held* that the hearing of *A*'s appeal was barred. *Zaharia v. Debia* (1) followed.

IN this case two suits were instituted in the court of the Subordinate Judge of Gorakhpur apparently on the same day. The plaintiff in both suits was *mahant* Udai Bhan Pargas *alias* Angan Das. In one suit the defendant was Anant Das; and in the other Anant Das and Sundar Das. In both suits the plaintiff claimed a declaration that he was *mahant* of a certain *math*. In the latter suit the claim was as follows:—"The plaintiff's title and the defendants' want of title may be established, and it may be declared that the plaintiff is entitled to receive the papers and the box aforesaid. The box and the papers detailed below may be awarded to the plaintiff." In the earlier part of the plaint the plaintiff stated "but as both the defendants deny the plaintiff's title, he brings this claim against both the defendants in respect of a box which contains papers, documents, etc., . . . and which Sundar Das the defendant has taken back after the institution of this suit without the plaintiff's knowledge." Both the suits were tried together, and amongst the issues framed were the following:—"Is the plaintiff *chela* of Karan Das, and was he appointed *mahant*? Has the plaintiff a right to sue? What is the custom relating to the *mahantship*, and was the plaintiff

* First Appeal No. 131 of 1911, from a decree of Harbandhan Lal, Additional Subordinate Judge of Gorakhpur, dated the 26th of January, 1911.

(1) (1910) I. L. R., 33 All., 51.

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appointed *mahant* according to that custom ? ” The result was that in the suit in which both Anant Das and Sundar Das were defendants there was a decree against both declaring the plaintiff's title. From that decree Sundar Das appealed, but Anant Das did not. This appeal, however, abated, Sundar Das having died, and no steps having been taken within time to bring his legal representative on to the record. The decree, therefore, in this case, became final. In the other case Anant Das appealed, but when the appeal came on for hearing a preliminary objection was raised to the effect that the decree in the first case having become final operated as *res judicata* in regard to this appeal.

The Hon'ble Dr. *Sundar Lal* and Munshi *Govind Prasad*, for the appellant.

Dr. *Satish Chandra Banerji* and Munshi *Iswar Saran*, for the respondent.

RICHARDS, C. J. and BANERJI, J.—A preliminary objection has been taken to the hearing of this appeal on the ground of *res judicata*. It is necessary shortly to state the facts in order that it may be understood how the question arises. Two suits were instituted in the court of the Subordinate Judge of Gorakhpur apparently on the same day. The plaintiff in both the suits was *mahant* Uday Bhan Pargas *alias* Angan Das. In the present suit Anant Das was the only defendant. In the other suit the defendants were (1) Sundar Das and (2) Anant Das, the appellant in this appeal. In both suits the plaintiff claimed a declaration that he was the *mahant* of a certain *math*. In the suit in which both Sundar Das and Anant Das were defendants the claim was as follows :—

“The plaintiff's title and the defendants' want of title may be established and it may be declared that the plaintiff is entitled to receive the papers and the box aforesaid. The box and the papers detailed below may be awarded to the plaintiff.”

In the earlier part of the plaint the plaintiff stated “but as both the defendants deny the plaintiff's title, he brings this claim against both the defendants in respect of a box which contains papers, documents, etc., . . . and which Sundar Das, the defendant, has taken back after the institution of this suit without the plaintiff's knowledge.”

Both the suits were tried together in the court below and amongst the issues framed were the following:—"Is the plaintiff *chela* of Karan Das and was he appointed *mahant*? Has the plaintiff a right to sue? What is the custom relating to the *mahantship*, and was the plaintiff appointed *mahant* according to that custom?" These issues were decided in favour of the plaintiff. The result was that in the suit in which both Sundar Das and Anant Das were defendants, there was a decree against both the defendants, declaring the plaintiff's title, after the issues to which we have referred had been decided. From the decree in that suit Sundar Das alone appealed, but Anant Das did not prefer an appeal. The appeal of Sundar Das abated by reason of the fact that after his death no steps were taken to bring his representatives on the record within the time allowed by law. Anant Das, however, did appeal in the suit out of which the present appeal arises, which, as we have already mentioned, was decided at the same time as the other suit, and by one and the same judgement. We must here mention that, although both suits were disposed of by the same judgement, separate decrees were drawn up in each case.

The respondent now by way of a preliminary objection contends that the appeal of Sundar Das having abated and Anant Das not having appealed from the decree in that suit, there is now a binding decree against him unappealed from. The appellant Anant Das, on the other hand, contends that section 11 of the Code of Civil Procedure, which deals with *res judicata*, does not apply to the present case, because the two suits were tried together and disposed of by one judgement on the same day, and secondly, because in any event, in the suit in which both Sundar Das and Anant Das were defendants, the real question was the title to the particular property mentioned in the plaint in that suit, and that therefore the decree which was given in that suit cannot be said to operate as *res judicata* on the question of the title to the property in dispute in the suit out of which the present appeal arises.

Section 11 of the Code is as follows:—"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent

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to try such subsequent suit, or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

In explanation (1) "former suit" is defined as denoting a suit which has been decided prior to the suit in question, whether or not it was instituted prior thereto. It cannot for one moment be contended that the decree in the suit in which both Sundar Das and Anant Das were defendants has not now become final as against Anant Das. Beyond all question the issue as to whether the plaintiff was or was not the *mahant* was decided in that suit and we are now called upon to decide the same issue in the present appeal. The result might be that if we were now to hear the appeal, there would be one binding decree declaring that Uday Bhan was the *mahant*, and another equally binding decree declaring that he was not, both decrees being in suits to which Anant Das was a party. It seems to us that it was to prevent anomalies of this description (amongst other reasons) that section 11 was enacted. No doubt it is somewhat unfortunate in the present case that the appellant is unable to have the question decided by this Court by reason merely of the fact that he did not appeal against the decree in the other suit. This view of the rule of *res judicata* was taken in the Full Bench case of *Zaharia v. Debiq* (1), a decision which is of course binding on us.

We accordingly dismiss the appeal with costs.

Appeal dismissed.

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February, 7.

Before Mr. Justice Sir George Knox and Mr. Justice Muhammad Rafiq.
KUNWAR SEN AND OTHERS (DEFENDANTS) v. JWALA PRASAD AND OTHERS
(PLAINTIFFS).*

Act No. XIX of 1873 (North-Western Provinces and Oudh Land Revenue Act), sections 146, 148 and 167—"Proprietor"—Mortgage by muafidar—Sale of mahal for default in payment of Government revenue—Rights of purchaser and mortgagees of the muafi.

Where certain *muafidars*, whose rights as such accrued before the year 1870, and were not shown to have been created by the zamindars of the *mahal* in which the *muafi* land in question was situate, executed a usufructuary mortgage of such land, and thereafter the *mahal* was sold for default in

* Second Appeal No. 152 of 1912 from a decree of H. Dupernex, District Judge of Farrukhabad, dated the 14th of December, 1911, reversing a decree of Gauri Shankar, Subordinate Judge of Fatehgarh, dated the 16th of May, 1911.

(1) (1310) I. L. R., 33 All, 51.

payment of Government revenue, it was held that the rights of the mortgagees were not extinguished in favour of the purchaser.

THE facts of this case were as follows :—

The plaintiffs brought a suit for the recovery of money or for possession on two mortgages in respect of land belonging to defendants 1 to 3. The *mahal* in which the land in question was situate was sold for arrears of revenue on the 24th of December, 1892, and purchased by one Jagan Bihari Lal, who again sold all his rights in the property to one Tara Chand, who was represented by defendants 4 to 6. These defendants contested the suit of the plaintiffs on the ground that they were the exclusive owners of the property having derived their title from Jagan Bihari Lal, to whom the whole *mahal* was sold at auction in default of arrears of revenue, and that even if defendants 1 to 3 (mortgagors) and the plaintiffs had any right as co-sharers, their right was extinguished after the sale of the property, in view of the provisions of section 167 of Act XIX of 1873. The first court, relying upon sections 146 and 148 of Act XIX of 1873, held that the plaintiffs were entitled to a decree for recovery of possession of the land in dispute. The lower appellate Court, however, found that the land in dispute was really *nankar* land and that no exproprietary tenancy had been created so far as the occupiers of the *nankar* land were concerned, and held that the plaintiffs' rights in the land were in no way affected by the sale of the *mahal* and gave the plaintiffs a decree for sale of the mortgaged property. The defendants appealed.

The Hon'ble Dr. Tej Bahadur Sapru (with him Munshi Gulzari Lal), for the appellants :—

As the entire proprietary rights in the village were sold the mortgage in suit was extinguished and could not be enforced. The land in dispute is described in the *mahalguzari* being *bir bila lagan batar* *malikana* *na* *Wala* *malikana* *Wala*. The word 'proprietor' used in section 146 of Act XIX of 1873 was not used in any restrictive sense, and under the provisions of that section all proprietors and the whole *mahal* were sold for the revenue for the time being assessed on the *mahal*. The entire *mahal* having been sold in default of arrears of revenue, the rights of the mortgagees were extinguished. It was the right in dismissing the plaintiffs' suit that was in question of section 167 of Act XIX of 1873.

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Dr. Satish Chandra Banerji, for the respondents, was not called upon.

KNOX and MUHAMMAD RAFIQ, JJ.:—The plaintiffs to the suit out of which this second appeal has arisen describe themselves as mortgagees from certain persons whom they have arrayed as defendants 1 to 3. It appears that the *mahal* in which the land in dispute is situate was sold for arrears of revenue which were due from the *mahal*. On the 24th of December, 1892, the *mahal* was sold at a revenue sale and purchased by one Jagan Bihari Lal. Jagan Bihari Lal in turn sold all the rights he had purchased to one Tara Chand and defendants 4 to 6 are the representatives in interest of Tara Chand. The mortgagees are now seeking to enforce their rights and ask that the mortgage money may be awarded to them by sale of the mortgaged property. The suit was defended only by defendants 4 to 6. The contention is that as the whole of the *mahal*, including the area in dispute, was sold to Jagan Bihari Lal, even if defendants 1 to 3 and the plaintiffs had any right as co-sharers, that right became extinct under section 167 of Act XIX of 1873. The land in dispute, they say, though known as grove land, is not actually a grove, but has been actually under cultivation from a long time prior to the execution of the mortgage set up by the plaintiffs. The Subordinate Judge of Farrukhabad, before whom the suit came in the first instance, relying upon sections 146 and 148 of Act No. XIX of 1873, held that the plaintiffs might be granted a decree for recovery of possession of the land in dispute. In appeal the learned Judge found that the land in dispute was really *nankar* land and no exproprietary tenancy had been created so far as the occupiers of the *nankar* land were concerned. He further held that their rights in the land were in no way affected by the sale of the zamindari. He therefore decreed the suit, against the first three defendants, for recovery of possession of the land in suit by the plaintiffs as usufructuary mortgagees of these defendants' interests as exproprietary tenants of the land in suit, for Rs. 800-0-0. But he dismissed the rest of the suit. Defendants 4 to 6 have appealed to this Court and they again contend that as the entire proprietary rights in the village Neknampur were sold, the mortgage in suit was extinguished and could not be enforced.

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Apparently the confusion into which the Subordinate Judge fell arose from the words in which the land in dispute is described in the *wajib-ul-arz* at the settlement of 1870. There the land is set out as being *sir, bila laguni bataur malikana wa bila mundarja khewat*, and it has been strongly argued before us that the terms used in sections 146 and 148 of Act XIX of 1873 justify the contention. It is true that in section 146 it is said that in the case of every *mahul* the entire *mahal* and all the proprietors jointly and severally shall be responsible to Government for the revenue for the time being assessed on the *mahal*, and that section 148 provides that any sum not so paid becomes thereupon an arrear of revenue and the persons responsible for it become defaulters. We are also referred to section 53 of the same Act. The learned counsel was asked whether he could produce any precedent in support of his contention that persons in a *mahal* who are generally known by the term *muafidars* and are, as in this case, persons who are not entered as payers of revenue to the Government for the time being, are, in the event of the *mahal* falling into arrears of payment of revenue, responsible for payment under section 146 and their rights, if the *mahal* is brought to sale, extinguished in favour of the seller. The rights of the mortgagors in the present case were rights which came into existence before the settlement of 1870. It is not shown, and it is in the highest degree improbable, that they were rights created by the zamindars who were responsible for the arrears under which the *mahal* in which the property in dispute was situate was brought to sale. In our opinion the word 'proprietor' used in sections 146 and 148 refers only to those who in the *wajib-ul-arz* are set out as being the persons on whom the revenue has been at the time of settlement assessed jointly or severally. The *wajib-ul-arz* of 1870 shows no such payment of revenue by the mortgagors in the present case. The contention raised in this appeal is in our opinion without force, and the view taken by the learned Judge is the correct view. It is not for us in the present case to say what precise position the mortgagee held in the *mahal*. All that we have to decide is what rights were sold in default of arrears of revenue. The appeal fails and is dismissed with costs.

Appeal dismissed.

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February, 12.

Before Mr. Justice Sir Harry Griffin and Mr. Justice Chamier.

BIHARI LAL AND OTHERS (DEFENDANTS) v. MAKHDUM BAKHSH AND OTHERS (PLAINTIFFS) AND ALIM-ULLAH KHAN AND OTHERS (DEFENDANTS)*.

Evidence—Mortgage—Recital of receipt of consideration—Recital admissible as against representatives of original mortgagor.

Held that the admission of the receipt of consideration contained in a mortgage deed is admissible in evidence against the representatives in interest of the original mortgagors. *Brajeshwar Peshakar v. Budhanuddi* (1), *Nawal Kunwar v. Bakhtawar Singh* (2) and *Abdul Majid v. Mahbub Ali* (3) followed. *Manohar Singh v. Sumirta Kuar* (4) not followed. *Bisheswar Dayal v. Harbans Sahay* (5), *Ghurpholani v. Purmeshwar Dayal Dubey* (6) and *Rahim Jan Bibi v. Imam Jan* (7) doubted.

THE facts of this case were as follows :—

This was a suit upon a mortgage made by one Najaf Khan in favour of an ancestor of the plaintiff in May, 1868. The first set of defendants are the heirs of Najaf Khan. The second set are purchasers after the mortgage of various portions of the mortgaged property. The mortgage purported to have been made in consideration of a sum of Rs. 22 due on a prior mortgage of 1887 and two sums said to have been paid just before and just after the execution of the deed. The courts below held that the payment of these two sums had not been proved, but that the mortgage was good for the sum of Rs. 92 and interest thereon. The evidence that the last mentioned sum was due upon a prior mortgage consisted of a recital in the deed in suit and the production by heirs of the mortgagor of the earlier deed, which does not bear endorsement showing that it had been paid off.

The court of first instance decreed the claim to the extent mentioned, and this decree was affirmed in appeal by the District Judge. The defendants appealed, contending that the recital in the mortgage deed of receipt of consideration was not admissible as regards them.

The Hon'ble Munshi Gokul Prasad (with him Munshi Haribans Sahai), for the appellants, submitted that such a recital was no

* Second Appeal No. 24 of 1912 from a decree of B. J. Dalal, District Judge of Jaunpur, dated the 30th of November, 1911, confirming a decree of Debi Prasad Chaturvedi, Second Additional Munsif of Jaunpur, dated the 5th of September, 1911.

(1) (1880) I. L. R., 6 Cal., 268. (4) (1895) I. L. R., 17 All., 428.

(2) (1912) 10 A. L. J., 390. (5) (1907) 6 O. L. J., 659.

(3) F. A. No. 129 of 1911. (6) (1907) 5 O. L. J., 653.

(7) (1911) 17 O. L. J., 173.

evidence against a purchaser of property and should be proved against him. He relied on *Manohar Singh v. Sumirta Kuar* (1), *Brajeshware Peshakar v. Budhanuddi* (2), *Ghurphelni v. Purmeshwar Dayal Dubey* (3), *Bisheswar Dayal v. Harbans Sahay* (4) and *Rahim Jan Bibi v. Imam Jan* (5).

Mr. S. A. Haidar, for the respondents, cited *Lalak Singh v. Ajudhia Prasad* (6).

The Hon'ble Munshi Gokul Prasad, replied.

GRIFFIN and CHAMIER, JJ.:—This was a suit upon a mortgage made by one Najaf Khan in favour of an ancestor of the plaintiff in May, 1868. The first set of defendants are the heirs of Najaf Khan. The second set are purchasers after the mortgage of various portions of the mortgaged property. The mortgage purports to have been made in consideration of a sum of Rs. 22 due on a prior mortgage of 1867 and two sums said to have been paid just before and just after the execution of the deed. The courts below have held that the payment of these two sums has not been proved, but that the mortgage holds good for the sum of Rs. 92 and interest thereon.

The evidence that the last mentioned sum was due upon a prior mortgage consists of a recital in the deed in suit and the production by the heirs of the mortgagor of the earlier deed which does not bear any endorsement showing that it had been paid off.

In second appeal it is contended that the recital in the deed is not admissible in evidence against the defendants. The defendants appellants rely upon the decisions of this Court in *Manohar Singh v. Sumirta Kuar* (1) and the decisions of the Calcutta High Court in *Brajeshware Peshakar v. Budhanuddi* (2), *Ghurphelni v. Purmeshwar Dayal Dubey* (3), *Bisheswar Dayal v. Harbans Sahay* (4) and *Rahim Jan Bibi v. Imam Jan* (5).

The first of the Calcutta cases is no authority for the proposition that a recital of the receipt of consideration contained in a mortgage is not admissible in evidence against a subsequent transferee of the property. On the contrary, the Chief Justice, the only

(1) (1895) I. L. R., 17 All., 428.

(4) (1907) 6 O. L. J., 659.

(2) (1880) I. L. R., 6 Cal., 268.

(5) (1911) 17 O. L. J., 173

(3) (1907) 5 O. L. J., 653.

(6) (1912) 10 A. L. J., 108.

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one of the three Judges who discusses the question at all, sh page 278 of the report how the mortgagor's admission of the receipt of consideration was admissible against a subsequent purchaser of the property. The statement at the foot of page 277 of the report is that a recital in a deed is not evidence against third persons but may be read in conjunction with what follows. This seems to have been overlooked by the learned Judges who decided the case of *Mahar Singh v. Sumirta Kuar* (1). In the last mentioned case the question was whether the admission by a mortgagor of the receipt of consideration contained in a deed was admissible in evidence against subsequent auction purchasers of the property. That question does not arise in the present case. There may be, we do not say that there is, some ground for distinguishing between the case of an auction purchaser and the case of mortgagee or a purchaser by private treaty. In the case of *Ghurphelni v. Purmeshwar Dayal Dubey* (3) all that was held was that an admission of receipt of consideration made by a mortgagor was not admissible against her step-daughters who, however, did not claim title under her. That decision has no bearing upon the present case. In the case of *Rahim Jan Bibi v. Imam Jun* (4) it was held that the receipt of the receipt of consideration contained in a *hibabilewar* was admissible against his daughter after his death. If, as seems to have been the case, the daughter was one of his heirs, we think the correctness of the decision is open to doubt, for under section 21 of the Evidence Act an admission is relevant and may be proved as against the person who makes it or his representative or his interest.

In *Nawal Kunwar v. Bakhtawar Singh* (5) it was held that a recital in a mortgage deed that a certain sum was paid to the mortgagee was admissible in evidence against a subsequent purchaser, by private treaty, of the property mortgaged and in *Abdul Majid v. Mahbub Ali* (6) it was held that a recital of the receipt of consideration contained in a deed of mortgage was as much binding upon his heirs as upon the mortgagor himself.

(1) (1895) 1 L. R., 17 All., 428.

(2) (1907) 6 O. L. J., 659.

(3) (1907) 5 O. L. J., 658.

(4) (1911) 17 O. L. J., 173

(5) (1912) 10 A. L. J., 390.

(6) F. A., No. 129 of 1911

It seems to us that the decisions in the two last mentioned cases are in reality supported by the decision in *Brajeshware Peshakar v. Budhanuddi*, and we must hold that the admission of the receipt of consideration contained in the mortgage deed now in suit is admissible against the defendants appellants, who are representatives in interest of the original mortgagor.

It is not for us in second appeal to consider the value of the admission, but we may say that it receives in our opinion strong support from the production of the deed of 1867 which bears no signs of having been paid off.

For the above reasons we dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Sir Harry Griffin and Mr. Justice Chamer.

RAM CHANDRA AND OTHERS (DEFENDANTS) v. ALI MUHAMMAD AND OTHERS (PLAINTIFFS) AND KAMARUDDIN BEG (PRO FORMA DEFENDANT)*.
Muhammadan law—Waqf—Right of Muhammadans to worship in mosques—Suit by individual Muhammadans whose right is infringed—Civil Procedure Code (1908), order I, rule 8.

Every Muhammadan who has a right to use a mosque for purposes of devotion is entitled to exercise such right without hindrance and is competent to maintain a suit against anyone who interferes with its exercise, but if he brings his suit in his personal capacity and not on behalf of the whole Muhammadan community, the decision will be binding only as between the plaintiff and the defendant and cannot be taken advantage of by, or be binding on, the Muhammadan community in general. *Jawahra v. Akbar Husain* (1) and *Dasondhay v. Muhammad Abu Nasar* (2) followed.

THE facts of this case are fully set forth in the judgement of the Court.

Pandit *Shiam Krishna Dar*, for the appellants.

Maulvi *Ghulam Mujtaba* and Munshi *Muhammad Ishaq*, for the respondents.

GRIFFIN and CHAMIER, JJ. :—The plaintiffs in this case, who are Muhammadans, allege that in the time of the Muhammadan kings a mosque and some houses were built in the town of Agra; that from that time the Muhammadans have always worshipped in the mosque and the property has all along been waqf; that some time

* Second Appeal No. 405 of 1912 from a decree of H. W. Lyle, District Judge of Agra, dated the 6th of January, 1912, confirming a decree of Muhammad Amanul Haq, Additional Munsif of Agra, dated the 25th of February, 1911.

(1) (1884) I. L. R., 7 All., 178.

(2) (1911) I. L. R., 33 All., 660.

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plaintiffs and the defendants. In these circumstances we do not think it necessary to interfere with the decree. The appeal is dismissed with costs.

Appeal dismissed.

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 February, 14.

Before Mr. Justice Sir Harry Griffin and Mr. Justice Chamiér.
 HADI HASAN KHAN (PLAINTIFF) v. PATI RAM (DEFENDANT.) *
Act (Local) No. II of 1901 (Agra Tenancy Act), section 4, chapter X—"Land"—Resumption of rent-free grants—Grove-land—Suit for resumption of grove-land not maintainable in Revenue Court.

Held that grove-land not being "land held for agricultural purposes" within the meaning of section 4 (2) of the Agra Tenancy Act, 1901, nor "land" within the meaning of Chapter X of the Act, no suit will lie in a Revenue Court for resumption of a rent-free grant of grove-land. *Sheo Mangal v. Sardar Singh* (1) and *Megh Singh v. Nazar Fatma* (2) referred to.

THIS was a suit under sections 150 and 154 of the Agra Tenancy Act, 1901, for resumption of a rent-free grant. The plaintiff alleged that the grant was made for the performance of a specific service in connection with the *Holi*, which he no longer required. The court of first instance (an Assistant Collector of the first class) decreed the claim. On appeal, however, this decision was reversed by the District Judge, on the ground that the land, being grove-land, was not 'land held for agricultural purposes' within the meaning of section 4 (2) of the Tenancy Act, and was not 'land' within the meaning of the word as used in Chapter X of the Act. The suit was accordingly dismissed. The plaintiff appealed.

The Hon'ble Dr. *Tej Bahadur Sapru* and Maúlvi *Muhammad Rahmatullah*, for the appellant.

Munshi Govind Prasad, for the respondent.

GRIFFIN and CHAMIER, JJ. :—This was a suit under sections 150 and 154 of the Tenancy Act for resumption of a rent-free grant. The plaintiff alleged that the grant was made for the performance of a specific service in connection with the *Holi*, which he no longer required. The Assistant Collector decreed the claim, but on appeal his decision was reversed on the ground that the land, being grove-land, was not 'land held for agricultural purposes' within the

* Second Appeal No. 413 of 1913 from a decree of F. E. Taylor, District Judge of Bareilly, dated the 27th of February, 1912, reversing a decree of Abdul Hadi Khan, Assistant Collector, First Class, of Bareilly, dated the 4th of September, 1911.

(1) (1909) 6 A. L. J., 749.

(2) Select Decisions of 1911, No. 4.

meaning of section 4 (2) of the Tenancy Act, and was not 'land' within the meaning of the word as used in Chapter X of the Act.

In the papers prepared at the settlement of 1836 and 1872 the land was recorded as held under a service grant, and during the current settlement it is recorded as a rent-free grant, and the *wajib-ul-arz* says that the land shall be held subject to the service to be rendered at the *Holi*.

The District Judge has not recorded a definite finding that the land is held rent-free on account of the service, but on the evidence no other conclusion is possible.

The plot however is a grove, apparently a mango grove, and has been recorded as such at all the three settlements. 'Land' is defined in the Tenancy Act as land let or held for agricultural purposes. The latest reported opinion of the Board of Revenue is that a grove is not 'land' as defined in the Act—see *Megh Singh v. Nazar Fatma* (1), where a previous decision of the Board regarding a guava grove was considered and distinguished. In *Sheo Mangal v. Sardar Singh* (2) two Judges of this Court doubted whether a grove was land within the meaning of the definition contained in the Act but the question was not definitely decided and, as far we are aware, never has been decided by this Court.

It is impossible to say whether the plot was a grove when the grant now in question was made; but, assuming that it was not then a grove, it has been a grove since 1836, and it must be presumed that if the trees were not standing on the land at the time of the grant they were subsequently planted with the consent of the proprietor.

In our opinion land held as a grove, whether on payment of rent or not, is not land held for agricultural purposes, and we can discover no reason for holding that the word 'land' is used in Chapter X of the Act otherwise than in the sense indicated by the definition.

In this view it must be held that the suit was not maintainable under Chapter X of the Act, nor would it avail the plaintiff if we were to treat the suit as one for ejectment of a tenant, for a rent-free grantee is not a tenant as defined in the Act.

(1) Select Decisions of 1911, No. 4. (2) (1909) 6 A. L. J., 749.

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It appears to us that if the plaintiff has any remedy it is by way of a suit in a civil court. The appeal is dismissed with costs.

Appeal dismissed.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Banerji.

GOBARDHAN SAHI AND ANOTHER (DEFENDANTS) v. JADUNATH RAI AND ANOTHER (PLAINTIFFS) AND NANHU SAHI AND OTHERS (DEFENDANTS)*

Act No. III of 1877 (*Indian Registration Act*), section 17 (n)—*Mortgage—Agreement to relinquish portion of principal and all interest—Acknowledgement—Registration.*

Held that an agreement executed by a mortgagee after the date of the mortgage whereby he relinquished a certain part of the principal and all interest, past and future, on the mortgage in lieu of certain services rendered by the mortgagor to the mortgagee was a document which required registration to make it admissible in evidence, and it could not be said to be an acknowledgement of payment within the meaning of the exception contained in section 17, clause (n), of the Indian Registration Act, 1877.

THIS was a suit for sale upon a mortgage, dated the 21st of March, 1900. In answer to the suit *pro tanto* the defendants pleaded that after the mortgage had been executed the mortgagors rendered certain services to the mortgagee and that in consideration of those services a certain part of the principal and all interest up to date and all future interest were relinquished by the mortgagee. To prove this agreement a certain document was tendered in evidence. The document was unstamped and unregistered. The difficulty as to the stamp was got over by payment of the duty and penalty, but the lower appellate Court rejected the document as inadmissible for want of registration and decreed the claim in full. The defendants appealed to the High Court.

The Hon'ble Pandit *Moti Lal Nehru*, for the appellants.

The Hon'ble Dr. *Sundar Lal* and the Hon'ble Dr. *Tej Bahadur Sapru*, for the respondents.

RICHARDS, C. J., and BANERJI, J.—This appeal arises out of a suit brought to realize the amount of a mortgage, dated the 21st of March, 1900, by the sale of the mortgaged property. The defendants pleaded that after the mortgage had been executed the mortgagors rendered certain services to the mortgagee, and that

* Second Appeal No. 480 of 1912 from a decree of F. D. Simpson, District Judge of Gorakhpur, dated the 16th of January, 1912, confirming a decree of Jagat Narain, Subordinate Judge of Gorakhpur, dated the 18th of November, 1911.

in consideration of those services a certain part of the principal and all interest up to date and all future interest were relinquished by the mortgagee. To prove this agreement a certain document was tendered in evidence. The document was unstamped and unregistered. The difficulty of stamp has been got over by the payment of duty and penalty, but the question of registration remains.

The court below held that the document required registration and therefore was inadmissible in evidence. Section 17 of Act No. III of 1877 (which was the Registration Act in force at the time of the execution of the document in question), provides that certain documents must be registered. A later section provides that documents which require to be registered cannot be admitted in evidence unless they are registered. Amongst the documents requiring registration are all documents of a non-testamentary nature which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest of a certain value to or in immovable property. There can be no doubt that prior to the execution of the document in question the mortgagee had a right to realize from the property mortgaged, all principal, together with all interest then accrued or that might thereafter accrue due on foot of the mortgage.

It is argued that the document in question comes within the exception mentioned in clause (n) to section 17. That clause exempts from the necessity of registration any endorsement on a mortgage deed acknowledging payment of the whole or any part of the mortgage money and also any other receipt for payment of money due under a mortgage when the receipt does not purport to extinguish the mortgage. In our opinion the document in question cannot be said to come within the exceptions mentioned in clause (n). The document is clearly an agreement to forego in part the plaintiffs' rights as against the mortgaged property in consideration of services rendered. It cannot in any sense be said to be a receipt for the payment of money not extinguishing the mortgage in whole or in part. It clearly does extinguish the mortgage to the extent of a considerable portion of the principal and the whole of the interest.

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Under these circumstances we think that the decision of the court below was correct. We accordingly dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

RAM CHANDRA NAIK KALIA (DECREE-HOLDER) v. ABDUL HAKIM

AND OTHERS (JUDGEMENT-DEBTORS)*

Civil Procedure Code (1908), order XXI, rule 16—Execution of decree—Decree for money and costs of suit—Transfer of the decree as to costs merely.

Held that a decree for payment of a sum of money and for costs of the suit is one and indivisible and the decree-holder cannot transfer the decree so far merely as it may be a decree for costs, retaining the right to execute the decree for the main sum awarded.

THE facts of this case were as follows :—

One Musammat Najm-un-nissa obtained a decree for dower and for costs against the heirs of her late husband Maulvi Farzand Ali. The heirs of Farzand Ali appealed to the High Court and the decree of the first court was affirmed. The appellants were made liable to pay the costs of Musammat Najm-un-nissa incurred in the High Court. Najm-un-nissa transferred the decree for costs of both the courts to the present appellant Ram Chandra Naik Kalia. The latter put in an application for execution of the portion of the decree transferred to him. The lower court held that the transfer in favour of Ram Chandra Naik Kalia was valid, but that he was not entitled to put the decree into execution, because, under order XXI, rule 16, the transferee became a joint decree-holder with Musammat Najm-un-nissa and as such he could not take out execution in respect of his share of the decree. The application was accordingly dismissed. The decree-holder appealed to the High Court.

Babu *Sital Prasad Ghosh* (with him Babu *Jogindro Nath Chaudhri*), for the appellant, contended that the court below was wrong in law in holding that the appellant was a joint decree-holder with Musammat Najm-un-nissa. The decree was not an indivisible decree but the two portions could be separated. Najm-un-nissa could have taken out execution of the decree for costs only and there was no bar to her transferee doing the same. The decree for costs had been passed personally against the heirs of Farzand Ali and Najm-un-nissa could have asked for the execution of that decree by arrest of

*First Appeal No. 239 of 1912 from a decree of W. R. G. Moir, District Judge of Mirzapur, dated the 16th of April, 1912.

those persons while in respect of her decree for dower the assets of Farzand Ali in the hands of his heirs were liable. If, therefore, Najm-un-nissa could have taken out execution separately for the two portions of the decree in her favour, her transferee, who obtained no interest in the portion of the decree relating to dower could, without any legal bar, have certainly done so.

Mr. *Nihal Chand*, for the respondents, submitted that order XXI, rule 16, contemplated that the whole decree or the whole of the interest of the joint decree-holder could be transferred. But if it was held that a portion of a decree or a portion of the interest of a joint decree-holder could be legally transferred, even then, when execution was taken out, it could be so done in respect of the whole decree only and not of a portion. In the present case the decree was for a sum of money and it could not be split up in such a way that a portion could be executed at one time and another portion at a different time.

Babu *Sital Prasad Ghosh*, in reply, argued that "a decree" in order XXI, rule 16, meant the decree that was transferred, which might be the whole or a part of it. By virtue of the transfer Ram Chandra Naik Kalia did not become a joint decree-holder. For a joint decree-holder meant the holder of a decree who had an interest in every bit of that decree. In the present case the appellant had no interest at all in the decree for dower. The decree in which he had an interest he had executed in full, so that there was no question of the decree being executed piecemeal. The principle upon which one joint decree-holder was not allowed to execute his share only of the decree was that the court had to safeguard the interest of the other decree-holders. In this case the interest of no one had to be safeguarded. What the transferee could execute he did and the matter ended there.

TUDBALL and MUHAMMAD RAFIQ, JJ.:—This appeal arises out of the following circumstances:—Musammat Najm-un-nissa, the widow of one Maulvi Farzand Ali, brought a suit against the other heirs of her deceased husband to recover a sum of Rs. 97,500 due to her as dower. She also asked for the costs of her suit. The District Judge decreed the claim in her favour. The judgement ends as follows:—"I, therefore, decree the claim in full with costs and future interest

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he could not borrow to add to family property. The mortgagee had to prove that the debt incurred was for family necessity and if the debt was time-barred, it could not be enforced against the family. Revival of a debt was not a family necessity and it was not permissible for a father or manager to revive such debts. There was a difference between reviving a debt and acknowledging a debt; *Gopal Narain Mozoomdar v. Muddomutty Guptee* (1), *Chinnaya Nayudu v. Gurunatham Chetti* (2) and *Dinkar v. Appaji* (3). The lower court had relied on *Narayanasami Chetti v. Samidas Mudali* (4), but an obligation to pay the debt did not help the plaintiff; he had to show that the debt was one which could be enforced.

The Hon'ble Dr. *Sundar Lal*, (Pandit *Rama Kant Malaviya* with him), for the respondents :—

The question is was the transaction to the advantage of the family. Money was advanced at an exceptionally low rate of interest. He could not get such easy terms if he had not revived the time-barred debt. The revival of the debt was therefore a family necessity. The debt was one which was enforceable against the father. It was an antecedent debt and as such the question of legal necessity does not arise. A son's liability to pay his father's debt is a pious obligation and is independent of the rule of limitation. The principle on which he has been made liable is entirely different—the idea being that he would suffer for the debts elsewhere if he did not discharge them in this world.

RICHARDS, C. J., and BANERJI, J. :—This appeal arises out of a suit brought on foot of a mortgage, dated the 9th of February, 1891. The mortgage was admittedly made by the father of a joint Hindu family. The consideration for the mortgage was a sum of Rs. 5,000 alleged to be due on account at the date of the mortgage, a sum of Rs. 6,500 representing interest calculated in advance, and Rs. 22,000 cash advanced to enable the mortgagor to purchase certain immovable property. The principal amount was made repayable by instalments extending over sixteen years. The court below has given a decree for Rs. 27,926-1-0.

(1) (1874) 14 B. L. R., 21. (3) (1894) I. L. R., 20 Bom., 155.

(2) (1882) I. L. R., 5 Mad., 169. (4) (1883) I. L. R., 6 Mad., 293.

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The question which has been urged before us in the present appeal is that the sum of Rs. 5,000, assuming it ever to have been a debt at all, was at the time of the execution of the mortgage time-barred, and that, therefore, it was not permissible for the mortgagor, as the father and manager of the joint Hindu family, to revive a time-barred debt and to create a mortgage for such time-barred debt on the family property. A ground was no doubt taken in the memorandum of appeal that on the evidence the court should not have held that there was any debt at all. In our opinion we ought to have no hesitation in accepting the finding of the court below that the debt was an honest debt, but that it was time-barred at the time of the execution of the mortgage.

The case resolves itself then into a question of law, namely, whether or not the father of a joint Hindu family can legally revive a time-barred debt and bind the family property to secure its repayment. Having regard to the decision of the majority of the Full Bench in the case of *Chandra Deo Singh v. Mata Prasad* (1) it seems to us that we must find the existence of family necessity before we can hold the family property bound. It is very difficult to say that there would ever be any necessity for the father or manager of the family to revive a time-barred debt. *Prima facie* and looked at from a wordly point of view it is very much against the interest of the family to revive such a debt. The very question was decided by a Bench of this Court in the case of *Indar Singh v. Sarju Singh* (2). It has been contended before us that we ought to hold, under the circumstances of the present case, that it was in the interest of the family that the time-barred debt should be revived. It is urged that the money was advanced upon very easy terms, and that, therefore, we should hold that the money could not have been obtained except on the condition of reviving the debt. In our opinion there is no sufficient evidence on the record to show that it was for the benefit of the family that the time-barred debt of Rs. 5,000 should be revived.

It has also been contended that the father, even if he could not bind his sons, could bind himself, and that, therefore, the payments which he made should be considered as payments made in respect of his interest in the property. We do not consider that this

(1) (1909) I. L. R. 31 All., 176. (2) (1911) 8 A. L. J., 1099.

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argument is sound. In our opinion the payments which were made must be attributed to payments made upon foot of the mortgage to the extent for which it was a good and valid mortgage, that is to say, to the extent of the family necessity proved. There is nothing to show that the payments were made by the father out of separate funds.

Under these circumstances we would have been quite prepared to have excluded the sum of Rs. 5,000 from the mortgage and dealt with the mortgage as if it had been made for an advance of Rs. 22,000 and no more. If we did this, however, we certainly should give the mortgagee interest upon Rs. 22,000, or so much thereof as for the time being remained unpaid, at a reasonable rate. We think under the circumstances that nine per cent. per annum would not be an excessive rate of interest. In the mortgage deed itself it was agreed that interest at that rate should be paid on overdue instalments. We find, however, that if we were to treat the mortgage as a mortgage for Rs. 22,000 only and calculated interest at the rate of nine per cent. (allowing the mortgagors credit for any sums where the instalments which were paid were more than sufficient to keep down interest) the amount due on such calculation would admittedly exceed the amount of the decree of the court below. Under these circumstances we see no reason whatever for interfering with the decree of the court below, and we accordingly dismiss the appeal with costs. The decree will carry future interest at the rate of six per cent. per annum from the date of the decree of the court below. To this extent we allow the respondent's objection. We extend the time for payment for six months from this date.

Appeal dismissed.

PRIVY COUNCIL.

P. C.*
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March, 4.SKINNER (PLAINTIFF) v. NAUNIHAL SINGH AND ANOTHER (DEFENDANTS)
AND 10 OTHER APPEALS, 11 APPEALS CONSOLIDATED.

[On appeal from the High Court of Judicature at Allahabad.]

Will—Construction of will—Rule of justice, equity and good conscience—Devise to eldest son and his lawful male children according to law of inheritance—Mortgages made by testator as full owner and mortgages made by son with an estate for life only—Rights of mortgages—Alternative case set up on appeal—Costs.

T. S., a domiciled resident of the North-Western Provinces of India, died on the 9th of November, 1864, leaving a will, dated the 22nd of October, 1864, [and therefore before the Indian Succession Act (X of 1865) came into force] whereby he made provision that certain villages, houses and other property should "at my demise descend to my eldest son T. B. S. and to his lawful male children according to the law of inheritance, and in the event of my eldest son T. B. S. dying without lawful male children, to my female children, or in the event of their death to the female children born in wedlock of my sons in succession." The testator had in 1863 mortgaged his property to the extent of Rs. 50,000 with interest, and his son T. B. S., after he succeeded to the property, further mortgaged it in 1867, 1869 and 1872, and in execution of decrees obtained against him on those mortgages the property was sold and his interest therein was acquired by the various auction purchasers. T. B. S. died in 1900 without lawful male children and was succeeded by the second son of the testator, the present appellant, who in 1905 and 1906 brought the present suits for ejectment against the auction purchasers, in which he prayed for decrees for "full proprietary possession" and the suits were dealt with on that footing in the Courts in India, the High Court, however, only dismissing the suits because there was no specific claim for redemption. On his appeal part of the appellant's case was that the High Court, instead of dismissing the suits, should have made decrees for possession conditional upon payment of the debts binding on the estate of the testator; and during the hearing it was conceded by counsel that on the construction of the will the appellant was only a life-tenant of the property.

Held that the regulation of the succession under the will was to be determined by the rule of "justice, equity and good conscience;" that the bequest was to be read in its entirety and together, and that so read there was in it no intention that his son T. B. S. should have an absolute ownership: the testator intended to regulate the succession after the death of T. B. S. and settle the mode of the subsequent enjoyment of the property, and such detailed regulations were only natural, necessary and entirely in place if T. B. S. was intended to be merely a tenant for life.

Held, therefore, that the rights under mortgages granted by T. B. S. ceased at his death, and that the appellant, as the next male heir, was entitled to the enjoyment of the estate for life free from any rights so acquired. The case, however, was very different with regard to the rights acquired under mortgages

* *Present*:—Lord SHAW, Lord MOULTON, Sir JOHN EDGE, and Mr. AMEER ALI.

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granted by the testator himself. Even if T. B. S. renewed such mortgages, the right of the mortgagees would not be prejudiced thereby, the renewal of a mortgage by a person with a limited interest in the estate not operating as a discharge of debts effectually secured upon the radical right. The appellant accordingly was not entitled to possession until full satisfaction had been made of the rights of all mortgagees and their successors under mortgages granted by the testator. The appeals were allowed and the suits remitted to the High Court on that footing.

The alternative case set up by the appellant on appeal was only permitted by their Lordships to be the ground of judgement, because it seemed possible in that way to construct the material for a just decision of the true rights of the parties concerned, which would be best for the interests of all, and prevent further litigation.

ELEVEN consolidated appeals 95 and 97 to 106 of 1911 from judgements and decrees (2nd March 1909) of the High Court of Judicature at Allahabad, which reversed judgements and decrees (26th March 1907) of the Subordinate Judge of Meerut.

The suits which gave rise to these appeals were brought to recover possession with mesne profits of certain villages in the district of Bulandshahr in the United Provinces, most of which were granted by the Government of India as a reward for good service to one Thomas Skinner, and all of which formed part of his estate on his death.

He died in November, 1864, leaving a will, dated the 22nd October, 1864, by which, together with other property, all the above-mentioned villages were bequeathed "to my eldest son Thomas Brown Skinner and to his lawful male children according to the law of inheritance," and "in the event of my eldest son Thomas Brown Skinner dying without lawful male children the above-mentioned property shall descend to my next male heir."

The material clauses of the will are set out in full in the judgement of their Lordships of the Judicial Committee.

Thomas Brown Skinner died on the 3rd of July, 1900, without lawful male children, and was succeeded by the appellant Richard Ross Skinner, the second son of the testator.

Thomas Skinner (the testator) had on the 1st of September, 1863, mortgaged the villages in dispute to the firm of Seth Lakhmi Chand and Seth Govind Das as security for a loan of Rs. 50,000, with interest at the rate of one rupee per cent. per mensem. The mortgagor undertook to pay off the amount of the loan with

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interest at the end of December, 1863, and stipulated that if he failed to do so, he would put the mortgagees in possession in order that they might be able to realize the amount due on the mortgage themselves. He died, however, without having redeemed the mortgage.

On the death of Thomas Skinner the Court of Wards took possession of his estate, and in 1867 made over possession of it to Thomas Brown Skinner, who was entered in the revenue registers as the proprietor of the villages. Thomas Brown Skinner put the Seths in possession of the mortgaged property under the deed of 1863, on which, on the 10th of November, 1867, there was due the sum of Rs. 43,294, and under a mortgage of that date he borrowed a further sum from them on the security of the same villages. Subsequently he took other loans on the same security from the same mortgagees under deeds of the 9th of October, 1869, and the 7th February, 1872. Part of the latter sums borrowed were to discharge debts of his father.

The property in dispute was sold in execution of decrees obtained against Thomas Brown Skinner, his equity of redemption being sold on the 20th of December, 1872, in the following villages under a decree obtained by Durga Prasad and Sri Ram, dated the 28th of August, 1871: Hirdeypur, purchased by Durga Prasad; Neknampur, Saonli, Raja Rampur, Dolai Rajpur, and Kishanpur, purchased by Seth Lachman Das and under the same decree his equity of redemption was, on the 20th of February, 1873, sold in Gangapur, Mathrapur and Mandpa; and purchased by Lal Singh and Kishan Singh.

Under a decree obtained by Gorakh Ram and Gauri Dat, dated the 19th of September, 1871, the equity of redemption of Thomas Brown Skinner was sold in Gangola on the 20th of September, 1872, and in Salehpur on the 20th of December, 1872, both purchased by Seth Lachman Das.

In execution of a decree of Jauhari Mal and Ram Prasad, and of the decree of Gorakh Ram and Gauri Dat his equity of redemption was on the 20th of December, 1872, sold in the villages of Sunperha, purchased by Seth Lachman Das, and Ainchar (two lots of 15 biswas and 5 biswas) purchased by the decree-holders: and in execution of a decree of Waris Ali and Pitambar, the decree of

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in 1863; that all the defendants were in possession as the representatives of the original auction purchasers, who had acquired merely the equity of redemption of the Thomas Brown Skinner, and were not entitled to be reimbursed; and that no question of adverse possession arose. In the result he gave decrees for possession to the plaintiff with mesne profits.

Appeals by the defendants were preferred and the High Court (*Sir John Stanley, C. J. and Banerji, J.*) reversed the decisions of the Subordinate Judge and dismissed the suits.

In appeal 95 the High Court took the findings of the Subordinate Judge on the questions involved in the will and as to the nature of the estate taken by Thomas Brown Skinner to be correct, but allowed the appeal on the ground that the mortgage of 1863 entitled the mortgagees to retain possession of the property as security for the amount due upon it, and therefore, without redeeming it, the plaintiff was not entitled to dispossess the mortgagees or their representatives. As no specific claim for redemption had been advanced, the High Court refused to direct an account of the rents and profits and dismissed the suits.

The material portion of the judgement was as follows:—

“It was contended on behalf of the defendants in the Court below, that the plaintiff is not entitled to recover possession of the property in suit unless he first redeem the mortgage made in favour of the Seths on the 1st of September, 1863. This contention was overruled by the learned Subordinate Judge on the ground that the aforesaid mortgage was only a simple hypothecation and did not give to the mortgagees the right to obtain possession, ‘or prevent the rightful owner from getting possession of the property as owner without immediately discharging that mortgage debt.’ In this view the learned Subordinate Judge was in our opinion in error. As we have pointed out above, the mortgage of 1863 provided that in default of payment of principal and interest according to the stipulation contained in the mortgage-deed, the mortgagor would put the mortgagees into possession of the mortgaged property. Although the mortgagees did not take possession at the time, there can be no doubt that when the subsequent mortgage of the 10th of November, 1867, was executed possession was surrendered to the mortgagees in accordance with the stipulation contained in the earlier document. The mortgagees or their representatives are admittedly in possession of the mortgaged property, and their possession must be treated, we think, as referable to the stipulation contained in the mortgage of 1863, which gave them a right to possession. The mortgage of 1867 did not supersede and extinguish *in toto* the mortgage of 1863. On the contrary, that mortgage must be regarded, we think, as a subsisting mortgage and as such entitling the mortgagees to retain possession as against any person claiming title through

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the original mortgagor as security for the amount due upon that mortgage. In this view, until the mortgage of 1863 has been redeemed, the plaintiff is in no event, whatever be his title, entitled to dispossess the mortgagees or their representatives. Whether Kunwar Naunihal Singh is the person solely entitled to remain in possession, or whether the Seths are also so entitled, there can be no doubt that one of them has the right to remain in possession so long as the mortgage of 1863 is subsisting.

"Therefore until the plaintiff redeems the said mortgage, he is not entitled to obtain possession of the property in question. In this suit there is no claim for redemption. Had such a claim been put forward, it would have been necessary to take an account of the rents and profits for the purpose of determining whether any and what amount is due upon the said mortgage. But, as we have said above, no such claim was advanced, and we do not think the plaintiff is entitled in this suit to ask that an account be taken from the defendants and a decree be made for redemption. (See *Murugasar Marimuttu v. De Soysa* (1)."

Appeal 95 of 1911 related to the villages of Neknampur, Salehpur, Sunperha, Gangola and Ghorl Bachera purchased by Seth Lachman Das.

Appeals 98 (relating to the village of Hirdeypur, purchased by Durga Prasad and Sri Ram in execution of their own decree), 99 (relating to the village of Kishanpur purchased by Seth Lachman Das in execution of Durga Prasad's decree and sold by him to the present respondents), 100 (relating to the village of Saonli), 101) relating to the village of Dolai Rajpur), 102 (relating to the village of Raja Rampur), 103 (relating to the village of Mandpa), 105 (relating to the village of Mathrapur), and 106 (relating to the village of Gangapur) were held to be governed by the same considerations as appeal 95, and they were also allowed and the plaintiff's suits dismissed.

In appeals 97 (relating to a 15 biswa share in the village of Ainchar), and 104 (relating to a 5 biswa share in the village of Ainchar) the defendants were held by the High Court entitled to retain possession until the mortgage redeemed by them had been discharged, notwithstanding their right to possession was referable to the purchase at auction sale of the right, title and interest of Thomas Brown Skinner, the tenant for life. In those also, therefore, the plaintiff's suits were dismissed.

On these appeals—

De Gruyther, K. C. and *G. C. O'Gorman*, for the appellants, relied on the judgement of the Subordinate Judge on all matters

(1) (1891) L. R., A. C., 69.

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If the construction of the will in the case of *Skinner v. Durga Prasad* (1) followed by the Subordinate Judge is held to be the correct one, namely, that Thomas Brown Skinner took only an estate for life, then on the same construction the appellant has only a life estate also. The High Court, it was submitted, had put a reasonable construction on the will. There was no offer made in the pleadings or in the lower courts to pay off the amounts due on the mortgages. The mortgage of 1863 did not become discharged or extinguished on the execution of the mortgages subsequently made by Thomas Brown Skinner: the intention was not to do that: *Gokal Das Gopal Das v. Puranmal Prem Sukh Das* (2) was referred to. The appellant had no right or title to any of the lands in dispute in these appeals, as on the right construction of the will—that Thomas Brown Skinner had an absolute estate—the appellant had no interest under it. Thomas Brown Skinner was always treated by the appellant, and by every one as being in possession as absolute owner. At any rate, if the appellant is held entitled to succeed in these suits, it should be subject to his paying off the mortgages due on the property in suit. Reference was made to *Murugasar Marimuttu v. De Soysa* (3), a somewhat similar case to the present. If the cases are sent back the Nawab of Rampur should be joined as a party.

W. A. Raikes for the respondents in appeal 101 contended that the appellant had not proved his title under the will, so as to enable him to maintain the suit. After the sale of the 20th of December, 1872, Seth Lachman Das and after him the respondent became absolute owners of the property. On the proper construction of the will Thomas Brown Skinner became absolute owner of the property, and could in any case bind it as against the reversioners. The suit, moreover, was barred by limitation. This respondent was a mortgagee of Thomas Skinner, and under a usufructuary mortgage he had been in possession for more than 60 years, and his possession had been adverse from 1832. He purchased the equity of redemption of the village of Dolai Rajpur, the subject of this appeal. Reference was made to *Matadin Kasodhan v. Kazim Husain* (4). The clauses of the will should

(1) (1904) I. L. R., 31 All., 239. (3) (1891) L. R., A. C., 69 (76).

(2) (1884) I. L. R., 10 Calc., 1035: (4) (1891) I. L. R., 13 All., 432.

L. R., 11 I. A., 126.

be read subject to any claim of adverse possession. In any case the appellant could not succeed during the existence of the mortgage of 1863.

B. Dube for the respondents in appeals 97, 103, 104 and 106 contended with respect to 97 and 104 that the appellant had not proved his title; that he had never offered to redeem the property; and that in any case he was liable to discharge the incumbrances created by Thomas Skinner and Thomas Brown Skinner before recovering the villages in suit; and, as to all the appeals, that the High Court was right.

J. M. Parikh and *J. R. Roy* for the respondents in appeals 98 and 105 contended that on the proper construction of the will Thomas Brown Skinner took an absolute estate in the property in suit; and that the appellant was not in any event entitled to recover possession of the property until he redeemed the mortgage of 1863.

De Gruyther, K. C., in reply, distinguished the case of *Murugasar Marimuttu v. De Soysa* (1) cited by Sir *Earle Richards, K. C.* If their Lordships were of opinion on the construction of the will that Thomas Brown Skinner took only a life estate under it, he would concede that the appellant took under the will no greater interest than that, and would ask to be allowed to redeem the incumbrances created by Thomas Skinner the testator: Reference was made to the Civil Procedure Code, 1882 (*Ameer Ali and Woodroffe*), page 683, where all the cases are collected relating to granting relief.

1913, *March 4th* :—The judgement of their Lordships was delivered by Lord SHAW :—

These are consolidated appeals from eleven judgements and decrees of the High Court of Judicature for the North-Western Provinces, Allahabad. The suits were for ejectment and were brought by the present appellant, Richard Ross Skinner. The Subordinate Judge of Meerut passed ejectment decrees and the appellant was granted absolute proprietary possession, with mesne profits, of certain villages situated in the district of Bulandshahr in the United Provinces. These judgements and decrees of the Subordinate Judge were reversed by the High Court.

(1) (1891) L. R., A. C., 69.

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In the proceedings before the Subordinate Judge many issues were taken and questions investigated and discussed.

With the exception of those to be hereafter referred to, it is unnecessary to enter upon these questions. For, as the result of the discussion before the Board, the appellant made a concession, which was (whatever may have been the nature of the other discussions before the Courts below) no part of his original pleadings or case. In the plaint he prayed "that a decree for full proprietary possession of the entire villages . . . be granted to the plaintiff." He further prayed for mesne profits and for costs of the suit, with interest upon these mesne profits up to the date of realization. It is true that the plaint also concluded "that any further relief which may be considered desirable and necessary be granted to the plaintiff," but, in their Lordships' opinion, this conclusion was treated by the plaintiff himself throughout the proceedings as merely ancillary to or consequential upon the radical demand he made for "full proprietary possession." The case in the Courts of India was throughout conducted upon the footing that he was entitled to this proprietary possession in a full and unconditional sense, that is to say, that any mortgages or duly constituted burdens granted even by Thomas Skinner over the properties were to be treated as wholly unavailing against him. Under the decree obtained no such rights were recognized. His position, in short, was that the whole of these burdens and mortgages might be ignored.

When, however, the case for the appellant to this Board was drawn, an alternative view was submitted, which is contained in the seventh reason. That reason was in this form:—"In any event the High Court of Judicature, Allahabad, should not have dismissed the suits, but should have passed decrees for possession conditional upon the payment of the debts binding on the estate of Thomas Skinner."

Their Lordships are of opinion that this case was never either openly or fully set up by the appellant before the Indian Courts, and that great embarrassment to the learned Judges therein, and great delay and loss, have ensued to the respondents by reason of the appellant's action in this regard. The Board has experienced considerable difficulty in permitting the alternative to be the ground

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and he also himself borrowed further sums in that year, in 1869 and in 1872, and granted mortgages over the properties therefor. In 1872 Lachman Das purchased at a sale, in execution of decrees obtained against Thomas Brown Skinner, the right under the mortgages both of the father, Thomas Skinner, in 1863, and of the son, Thomas Brown Skinner, in 1869 and 1872. Other transactions and some transmissions took place with regard to the villages, but these need not be entered upon. From this main sketch it is to be observed generally that Thomas Brown Skinner had in point of fact acted, as all parties to the transactions appear to have acted, on the footing that he was the owner of the father Thomas Skinner's estate in the villages, and was the absolute owner. If this was the true view, all questions in the case are at an end, and the suit for possession must entirely fail. How does this question stand?

This depends upon the construction to be given to two clauses of destination occurring in Thomas Skinner's will of 1864. They are in these terms :—

“ (4) That my private zamindari presented to me by Government as a reward for services rendered during the rebellion of 1857, as well as all villages, houses and other property added by me from time to time to the original grant may, at my demise, descend to my eldest son, Thomas Brown Skinner, and to his lawful male children according to the law of inheritance.

“ (5) In the event of my eldest son, Thomas Brown Skinner, dying without lawful male children, the abovementioned private zamindari, &c., shall descend to my next male heir, and should all my sons die without lawful male children, the zamindari, &c., shall descend to my female children, or, in the event of their death, to the female children born in wedlock of my sons in succession.’

It is strenuously contended that under this destination Thomas Brown Skinner (who, it may be mentioned, was an illegitimate child, and who was, at the date of his father's death, about fourteen years of age) took an absolute estate as contradistinguished from an estate

for his life. Reference is made to the Succession Act, section 84, which provides that "where property is bequeathed to a person, and words are added which describe a class of persons, but do not denote them as direct objects of a distinct and independent gift, such person is entitled to the whole interest of the testator therein, unless a contrary intention appears by the will ; " and one of the illustrations in the section is specially founded upon, namely, " to A. and the heirs male of his body." The Act was passed in the year 1865. By section 331 of the Act it is enacted that " the provisions of this Act shall not apply . . . to any will made or any intestacy occurring before the first day of January, 1866." But, as stated, Thomas Skinner the testator died in 1864. It is contended, however, that although this may be so, yet, according to the law of India, prior to the enactment of that Act, a destination to " Thomas Brown Skinner and to his lawful male children according to the law of inheritance " was, in point of fact, an effective form of conveyance of no less than absolute ownership.

In determining this question it is the opinion of their Lordships that the destination must be read in its entirety and together. Following the words quoted there occur these :—" In the event of my eldest son, Thomas Brown Skinner, dying without lawful male children, the abovementioned private zamindari, &c., shall descend to my next male heir." The argument of Richard Ross Skinner, who, in point of fact, was the next male heir, is that his brother, Thomas Brown Skinner, had only the interest of a tenant for life. On reading still further on in the destination it is found that the appellant is not entitled himself, if his own argument be sound, to the position of absolute owner, for the destination continues : " And should all my sons die without lawful male children, the zamindari, &c., shall descend to my female children, or in the event of their death, to the female children born in wedlock of my sons in succession." His learned counsel accordingly conceded that the appellant is, as was his brother before him, only a tenant for life. The event has not yet been ascertained whether the appellant shall or shall not die without lawful male children. If there should be such children, no doubt they would be the absolute owners of the properties, but if he should die childless, then the destination over to female children will, it is argued, take place.

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The question is full of embarrassment and difficulty. It is no doubt a temptation to be rid of the troublesome issues, with consequent accountings, by holding that the absolute ownership was in Thomas Brown Skinner; but—for this temptation must be put aside—the only question that their Lordships have to consider is whether it was the testamentary intention of Thomas Skinner, under the form of language adopted, to create by his will an absolute ownership in Thomas Brown Skinner. From the case of *Barlow v. Orde* (1) (in which, it may be observed, the history of the Skinner family is referred to in a judgement of Lord Westbury) it is plain that English rules of interpretation—in so far at least as these are artificial rules of construction which have arisen in the administration of English Courts of Equity—must not be allowed to govern the interpretation of Thomas Skinner's will. Questions affecting the construction of such a settlement as the present, or the regulation of a succession under it, must be determined by the principles of natural justice, or, to use the familiar language, according to "justice, equity and good conscience."

So, looking at this settlement, their Lordships do not find themselves able to affirm that Thomas Skinner meant his son Thomas Brown Skinner to have an absolute ownership of these villages. So to conclude, would be to affirm that the former a month before his death set forth an elaborate scheme of destinations over, while all the time he was really meaning that the boy of fourteen was to take the absolute ownership if he survived him. If the son was to be a tenant for life merely, then the detailed regulations for successive enjoyment and descent were entirely in place; they were natural and necessary. There are considerations either way; but it seems to their Lordships a more likely and more reasonable conclusion to come to, that Thomas Skinner did mean to regulate the succession after the death of his son, and addressed his mind to the consideration of what should be the steps and order of that subsequent enjoyment of his property. In their Lordships' opinion accordingly, the possession of Thomas Brown Skinner of these villages was the possession of a tenant for life.

It follows that the mortgages granted by Thomas Brown Skinner were ineffectual to convey or give any rights over any

(1) (1870) L. R., 3 P. O., 164; 13 Moo. I. A., 277; 5 B. L. R., 1.

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Upon the whole, however, it does not appear to their Lordships that justice will be done between these parties if the present suit be dismissed, with the prospect of further litigations to determine a matter now substantially ripe for settlement. They are further of opinion that the appellant is not entitled, even under the present suit, to enter into possession until full satisfaction is first made of the rights of all mortgagees and their successors under the mortgage deeds granted by Thomas Skinner. Should this condition be not, within what appears to the Court below to be a proper and sufficient time, satisfied, then in their Lordships' opinion a decree dismissing the suit in respect of this failure could then be pronounced.

Had the condition of a grant of possession which was conceded at their Lordships' Bar been made upon the plaint or the pleadings in the Court below, the whole of the protracted litigation would have been saved, except to the extent of a simple determination of the point of the construction of Thomas Skinner's will.

In their Lordships' opinion, accordingly, justice to the parties will be most nearly approached if the appellant make payment to the respondents of the costs of the proceedings in both Courts of India, and if, in regard to the appeal before this Board, neither party be found entitled to costs. Their Lordships will accordingly humbly advise His Majesty that the appeals should be allowed, that the causes should be remitted to the High Court to be dealt with upon the footing that the rights under mortgages granted by the late Thomas Skinner should be satisfied by payment being made to the mortgagees or their successors, that upon these payments being made and that within such reasonable time as shall be fixed in the Court below, a decree for possession shall be pronounced in favour of the appellant, and that, failing such payment within such time, the suits shall stand dismissed.

Appeals allowed.

Solicitors for the appellant :—*T. L. Wilson & Co.*

Solicitor for the respondents in appeals 95, 99, 100 and 102 :—*The Solicitor, India Office.*

Solicitors for the respondents in appeals 97, 103, 104 and 106 :—*Barrow, Rogers & Nevill.*

Solicitors for the respondents in appeal 101 of 1911 :—*T. C. Summerhays & Son.*

Solicitor for the respondents in appeals 98 and 105 :—*Edward Dalgado.*

J. V. W.

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[On appeal from the High Court of Judicature at Allahabad.]

Act No. XV of 1877 (Indian Limitation Act), section 19 and schedule II, article 148—Acknowledgement, effect of—Acknowledgement by widow in possession of husband's estate—Suspension of limitation—Act XV of 1877, section 9—Act XIV of 1859, section 1, clause 15—Res judicata—Contentions raised for the first time on appeal to His Majesty in Council—Practice of Privy Council.

P. C. *
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February, 6.
March, 6.

In a suit brought by the appellant on the 4th of March, 1907, against the respondents for the redemption of a mortgage, dated the 2nd of January, 1842, made between the respective predecessors in title of the parties and in which no date for redemption was specified, acknowledgements of the mortgagor's right had been made by the widow and daughter of a former mortgagee, a predecessor in title of the respondents, which, the appellant contended, extended the period of limitation.

Held that the law of limitation applicable to the case was not Act XIV of 1859, the law in force at the date of the acknowledgements, but Act XV of 1877, which was in force at the time of the institution of the suit.

Under article 148 of schedule II to that Act the period of limitation prescribed for a suit to redeem a mortgage was 60 years from the time when the right to redeem accrued, and by section 19 an acknowledgement to be effective must be "signed by the party against whom such right is claimed or by some person through whom he claims title."

Held that the respondents derived title through the last male owner, and not through his widow and daughter, who were therefore not competent under section 19 to make an acknowledgement of the right of redemption so as to bind any interests except their own. To hold otherwise would be to extend the power of a Hindu female in possession of a limited interest to bind the estate to an extent which was not sanctioned by authority.

An acknowledgement of liability only extends the period of limitation within which the suit must be brought, and does not confer title, and, with reference to section 2 of Act XV of 1877, was not a "thing done" within the meaning of section 6 of the General Clauses Consolidation Act (I of 1868.)

There was nothing in article 148 of schedule II of Act XV of 1877 to justify a holding that by reason of the fusion of the interests of the mortgagor and mortgagee (which, it was alleged, took place between the years 1883 and 1898) the

* *Present* :—Lord SHAW, Lord MOULTON, Sir JOHN EDGE, and Mr. AMBER ALI.

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period of limitation which began to run on the 3rd of January, 1842, was suspended; which would be deciding contrary to section 9 of the Act: this suit not being one to which the proviso to that section applied.

Burrell v. Earl of Egremont (1) distinguished.

The present suit was not barred as *res judicata* by a former suit in 1904.

With regard to contentions raised on this appeal which had not been raised before at any stage of the case, and consequently had not been considered by any of the courts below, nor were even suggested in the reasons in the case of the appellant to England, their Lordships adhered to the established practice of the Board not to allow new cases to be made for the first time on appeal to His Majesty in Council.

APPEAL from a judgement and decree (7th August 1909) of the High Court at Allahabad, which reversed a judgement and decree (24th March 1908) of the court of the District Judge of Aligarh, who had affirmed a decree (16th September 1907) of the Subordinate Judge of Aligarh.

The suit out of which this appeal arose was one for redemption of a mortgage, dated the 2nd of January, 1842, and the only question for determination on this appeal is whether the suit is barred by limitation. The District Judge held that it was not barred; but on appeal the High Court (BANERJI and TUDBALL, JJ.) reversed that decision and dismissed the suit.

The case before the High Court will be found reported in I. L. R., 32 All., 33, where the facts are sufficiently stated.

The facts of the case are also fully stated in the judgement of their Lordships of the Judicial Committee.

On this appeal, which was heard *ex parte*—*G. Cave, K. C.* and *J. M. Parikh* for the appellant contended that the suit was not barred by limitation. The Act of Limitation applicable to the suit was Act XIV of 1859, section 1, clause 15, under which the acknowledgements of 1866 and 1867 made by Musammat Jamna, and Musammat Janki respectively were valid and binding on the respondents and therefore effective to extend the period of limitation. Those acknowledgements, having been made while Act XIV of 1859 was in operation, were, within the meaning of section 6 of the General Clauses Consolidation Act (I of 1868) "things done" before the Limitation Act, XV of 1877, came into force, and that Act being a repealing Act did not affect them. The appellant, it was therefore submitted, acquired a title under Act XIV of 1859, and Act IX of 1871, and, under section 2 of Act XV

(1) (1844) 7 Peav., 205.

of 1877, nothing contained in that Act affected his title. The ladies, who claimed through the original mortgagee, were full owners of the mortgagee rights, and therefore bound the succeeding heirs in the way stated in *Katuma Nutchur v. Rajah of Shwagunga* (1). They represented the estate, and their acknowledgements were valid, so as to bind their successors in title the respondents. *Bhagwanta v. Sukhi* (2), and Mayne's Hindu Law (7th ed.), page 705, paragraph 519, page 818, paragraph 605, page 840, paragraph 624, and page 852, paragraph 634, were referred to. Moreover, between the years 1883 and 1898 there was a union of the rights of the mortgagor and those of the mortgagee in the appellant and his father, the effect of which, it was submitted, was that the operation of the Limitation Act was suspended during that period, and consequently, even if Act XV of 1877 applied, the suit would not be barred by lapse of time. There must under article 148 of Act XV of 1877 be one person liable to pay interest under the mortgage and with a right to redeem and another person entitled to receive interest, and liable to a suit for redemption; and where there is a union of those rights in one person, as there was here between 1883 and 1898, there was no operation of the Act. Reference was made to *Burrill v. Earl of Egremont* (3), the principle on which Lord Langdale M. R. acted in that case in construing section 40 of 3 and 4 Will. IV, C. 27, being, it was contended, applicable to the present case; and *Sengram v. Knight* (4): and sections 9 and 20 of Act XV of 1877 were also referred to. As long as the right of the mortgagee, and the right of redemption remained in one person, the equity of redemption could not be enforced. The cause of action for redemption arose again at earliest when, on the death of Musammat Janki in 1898, there was separation of those rights—under article 148 limitation begins to run when the right to recover possession accrues, and until 1898 there was no right to recover possession. It was also contended that in 1904 the respondent being full owner of the property sued only for the mortgagee's right, and did not assert his right to that of the mortgagor; his conduct led the appellant to believe that he (the appellant) could redeem the

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(1) (1863) 9 Moo. I. A., 539 (603). (3) (1844) 7 Beav., 205 (234).

(2) (1899) I. L. R., 22 All., 33. (4) (1867) L. R., 2 Ch. App., 632.

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mortgage, and operated as an estoppel against him.

The present suit was not barred by the suit brought by the respondent in 1904, the right to redeem was not in that suit decided against the appellant.

1913, *March 6th*:—The judgement of their Lordships was delivered by Sir JOHN EDGE:—

The suit in which this appeal has arisen was brought on the 4th of March, 1907, by Lala Soni Ram the appellant here for the redemption of a mortgage which had been made on the 2nd of January, 1842, by the then owners of mauza Kheria Buzurg in favour of Khushwakt Rai, who was on the making of the mortgage put in possession by the mortgagors. The mortgage was usufructuary, the profits, except Rs. 80 per annum, were to be taken by the mortgagee in lieu of interest and the mortgagee was to pay to the mortgagors annually the Rs. 80 as malikana.

By the mortgage it was provided that the mortgagors should be entitled to redeem and to obtain possession of the mortgaged property on payment of Rs. 4,000, which was the amount advanced to them. No date for the redemption of the mortgage was specified, and consequently the mortgage became liable to be redeemed immediately after it was made. The whole 20 biswas of Kheria Buzurg were included in the mortgage, but the original mortgagors, or some of them, redeemed the mortgage so far as it affected 6 biswas, 17½ biswansis of Kheria Buzurg, and this suit relates to the right to redeem the mortgage so far as it affects the remaining 13 biswas 2½ biswansis of the property which was mortgaged in 1842, if that right could at the date of the suit have been enforced by suit.

In order to understand the issues which were raised and were tried in the court of first instance, or on appeal below, it is necessary briefly to refer to the title of Lala Soni Ram, the plaintiff appellant, as representing the original mortgagors and to the title of the defendants respondents as representing the original mortgagee Khushwakt Rai, and to refer to a suit which was brought on the 18th of May, 1904, by the present defendant respondent Babu Charan Behari Lal, and his brother Lala Shib Shankar Lal against the present plaintiff appellant Lala Soni Ram. Lala Shib Shankar Lal

was a defendant to this suit and is represented here by the respondents to this appeal.

Between the years 1880 and 1883 Mannu Lal, since deceased, who was the father of the plaintiff appellant, acquired the rights and interests of the original mortgagors in 13 biswas, 2½ biswansis of Kheria Buzurg to which this suit relates. These rights and interests, so far as they can be enforced, are now vested in the plaintiff appellant, Lala Soni Ram.

Khushwakt Rai, the original mortgagee, died shortly before 1855, leaving surviving him his widow, Musammat Jamna, who died on the 10th of May, 1866, and a daughter Musammat Janki, who died on the 30th of May, 1898. Babu Charan Behari Lal and Lala Shib Shankar Lal, who were the plaintiffs in the suit of 1904, were the sons of Musammat Janki.

On the 31st of March, 1866, Musammat Jamna, who had succeeded to a Hindu widow's estate on the death of her husband Khushwakt Rai, executed a sale deed by which she transferred a moiety of her interest as mortgagee of Kheria Buzurg to Debi Prasad and Gulab Rai, and on the same date by deed hypothecated to them the other moiety of her interest as mortgagee. On the 29th of April, 1867, Musammat Janki executed a sale deed in favour of Debi Prasad and Gulab Rai, by which she transferred to them her interest as mortgagee in the moiety of Kheria Buzurg which had been hypothecated to them by Musammat Jamna in 1866. The mortgagee's interest in Kheria Buzurg, which, by the sale deeds of 1866 and 1867, had vested for the lives of Musammat Jamna and Musammat Janki in Debi Prasad and Gulab Rai, vested by assignments in or before 1883 in Mannu Lal, and from 1883 until Musammat Janki's death in 1898 Mannu Lal or his son, Lala Soni Ram, the plaintiff appellant, who succeeded him, enjoyed the rights of the mortgagors and the mortgagee in the 13 biswas 2½ biswansis.

In the deed of the 31st of March, 1866, Musammat Jamna had described herself as a mortgagee and had acknowledged the existence of the mortgage of 1842, and in the deed of the 29th of April, 1867, Musammat Janki had similarly described herself as mortgagee and acknowledged the existence of the mortgage. Neither of those deeds is before this Board, but that is the

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inference which their Lordships draw from the proceedings and the judgements in the Courts below.

After the death of Musammat Janki her sons, Babu Charan Behari Lal and Lala Shib Shankar Lal, brought a suit on the 18th of May, 1904, against Lala Soni Ram, the present plaintiff appellant to obtain possession as mortgagees of the 13 biswas $2\frac{1}{2}$ biswansis of Kheria Buzurg on the ground that the transfers which were made in the life-time of Musammat Jamna and Musammat Janki became ineffectual as against them on the death of those ladies. In that suit Babu Charan Behari Lal and Lala Shib Shankar Lal on the 12th of October, 1904, obtained a decree for possession.

So far as appears from that part of the record which is before this Board, Babu Charan Behari Lal and Lala Shib Shankar Lal did not in the suit of 1904 allege or admit that the mortgagors' interest had vested in Mannu, or was vested in Lala Soni Ram, the present plaintiff appellant; their case apparently simply was that the title to the mortgagees' interest which had been transferred by Musammat Jamna and Musammat Janki had determined, so far as Lala Soni Ram was concerned, on the death of Musammat Janki, and that they became entitled as representing Khushwakt Rai, the mortgagee, on her death to possession as mortgagees. Their case was, that after the death of Musammat Janki, Lala Soni Ram was a trespasser, as in fact he was, and they claimed mesne profits. It does not appear that Babu Charan Behari Lal and Lala Shib Shankar Lal alleged, or otherwise admitted, in the suit of 1904, that a right to redeem the mortgage of 1842, which could be enforced by suit, was vested in anyone, nor was it material to their cause of action that a right to redeem which could be enforced by suit should be vested in anyone. Their title to possession on the death of Musammat Janki, which was the title they claim, related back to and was based on the mortgage of 1842, whether the right to enforce by suit redemption of that mortgage had or had not been extinguished before the 18th of May, 1904, by limitation. The mortgage had not been redeemed and nothing had happened between the death of Musammat Janki and the 18th of May, 1904, to disentitle Babu Charan Behari Lal and Lala Shib Shankar Lal to a decree for possession based on that original title. As a matter of fact if Lala Soni Ram had desired, on the death of

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Musammat Janki, in 1898, to redeem, he could have brought his suit within sixty years from the date of the mortgage, as the sixty years did not expire until January, 1902, but apparently he hoped, by holding on to the possession of the 13 biswas $2\frac{1}{2}$ biswansis to escape from having to pay the Rs. 4,000 redemption money. When the suit of 1904 was brought, the period of 60 years, computed from the 2nd of January, 1842, had expired.

In this appeal, which is *ex parte*, the plaint and other pleadings in the suit of 1904 are not before their Lordships, but they draw the inference which they have expressed from the judgement of the 12th of October, 1904, and from the judgement of the Courts below in this suit. The effect of the suit of 1904 was to give by process of law to Babu Charan Behari Lal and Lala Shib Shankar Lal the possession as mortgagees to which they had become entitled on the death of their mother Musammat Janki on the 30th of May, 1898.

Lala Soni Ram, the present plaintiff appellant, on the 4th of March, 1907, brought in the Court of the Subordinate Judge of Aligarh this suit against Lala Shib Shankar Lal and Babu Charan Behari Lal for the redemption of the mortgage of the 2nd January, 1842, so far as it affected the 13 biswas $2\frac{1}{2}$ biswansis of Kheria Buzurg. Other defendants were subsequently added. In their written statement Lala Shib Shankar Lal and Babu Charan Behari Lal admitted that the mortgage of the 2nd of January, 1842, was made, and so far as is now material pleaded that the suit was not brought within 60 years of the date of the mortgage, that no admission of the right of the mortgagor was made within 60 years from the date of the mortgage, and consequently that the suit was barred by limitation. They also alleged that in the suit of 1904 Lala Soni Ram had pleaded that he had a right to redeem, but that the Court in that suit had decreed their claim for possession, and they relied upon section 13 of the Code of Civil Procedure. They further pleaded that in the suit of 1904 it had been decided that the deeds which had been executed by Musammat Jamna and Musammat Janki were not binding upon them, the answering defendants, after the deaths of those ladies.

The Subordinate Judge held, and rightly as their Lordships consider, that the suit of 1904 did not by the operation of section

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13 of the Code of Civil Procedure bar the present suit. The suit of 1904 was a suit by Lala Shib Shankar Lal and Babu Charan Behari Lal for possession as mortgagees. The mortgage had not been redeemed, and the plea of Lala Soni Ram that he was entitled to redeem was irrelevant to a suit by the usufructuary mortgagee for possession. Lala Soni Ram's title as mortgagor was not in question in that suit, nor could he as a defendant to that suit have converted that suit into one in which he could have obtained a decree for redemption. The Subordinate Judge, however, applying section 15 of Act XIV of 1859 to the case, held that the acknowledgements of the existence of the mortgage by Musammam Jamna and Musammam Janki in their respective deeds brought the suit within time, and he gave the plaintiff a decree for redemption.

The District Judge of Aligarh, on appeal from the decree of the Subordinate Judge, affirmed the judgement of the Subordinate Judge, and by his decree of the 24th of March, 1908, dismissed the appeal. From the decree of the District Judge the defendant appealed to the High Court at Allahabad. The High Court, rightly holding that the law of limitation applicable to a suit or proceeding, is the law in force at the date of the institution of the suit or proceeding, unless there is a distinct provision to the contrary, held that Act XV of 1877, and not Act XIV of 1859, was the Limitation Act which was applicable to the suit. By section 19 of Act XV of 1877, it is, so far as is material for present purposes, enacted as follows :—

"If, before the expiration of the period prescribed for a suit or application in respect of any property or right, an acknowledgement of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed or by some person through whom he claims title or liability, a new period of limitation, according to the nature of the original liability, shall be computed from the time when the acknowledgement was so signed."

This is a suit to redeem and the period prescribed by article 148 of the second schedule to Act XV of 1877 within which a suit against a mortgagee to redeem or to recover possession of immovable property mortgaged is 60 years from the time when the right to redeem or to recover possession accrues.

The learned Judges of the High Court held that there could not be any doubt that the mortgage of 1842 was in terms admitted by Musammam Jamna and Musammam Janki in their respective deeds.

but they also held that the defendants derived title through their grandfather Khushwakt Rai, who was mortgagee and the last full owner of the rights of the mortgagagee, and did not derive title through Musammat Jamna or Musammat Janki, who, although for certain purposes they did represent the estate, were not persons who could be deemed to have admitted for the benefit of the mortgagee's estate a right of redemption in the mortgagor, and that in making such acknowledgements they had no power to bind any interests except their own. To have held otherwise would, in their Lordships' opinion, have been to extend the power of a Hindu woman in possession for her limited interest to bind the estate to an extent which has not been sanctioned by authority.

It was also contended in the High Court on behalf of the plaintiff that there had been a fusion of the interests of the mortgagee and the mortgagor in the same person between the years 1883 and 1898; and that no mortgage was in existence during that period; and that article 120 of the second schedule of Act XV of 1877, and not article 148 applied; and that the suit was within time. The learned Judges of the High Court pointed out one obvious answer to that contention. It was that, if article 120 applied, the suit was not within time, as Musammat Janki had died more than six years before the suit was brought. They also pointed out that the mortgagee's interest which became vested in Mannu was only the limited interest of a Hindu lady, and consequently there had been no merger. The High Court, by its decree of the 7th of August, 1909, allowed the appeal on the ground that the suit was barred by limitation and dismissed the suit with costs in all Courts. From that decree the plaintiff Lala Soni Ram has brought this appeal.

In this appeal it has been contended that the Limitation Act applicable to this case is Act XIV of 1859, and consequently the acknowledgements of the existence of the mortgage of 1842 which were contained in the deeds which were executed by Musammat Jamna and Musammat Janki brought this suit within time. As to that contention it is sufficient for their Lordships to say that they agree with the High Court that Act XIV of 1859 does not apply to this suit and that the Limitation Act which does apply is Act XV of 1877, and further that the acknowledgements which were

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made by Musammat Jamna and Musammat Janki were not acknowledgements within the meaning of section 19 of Act XV of 1877 made by a person or persons through whom the defendants derived title or liability. Their Lordships consequently consider that these acknowledgements were ineffectual to give a new period of limitation. The contention in this appeal which is based upon section 6 of the General Clauses Act and section 2 of Act XV of 1877 was pressed upon the High Court. Their Lordships agree with the High Court that an acknowledgement of liability only extends the period of limitation within which a suit must be brought and does not confer title, and is not a "thing done" within the meaning of section 6 of the General Clauses Act.

In this appeal it was also contended that the operation of Act XV of 1877 was suspended during the whole period 1883—1898 when Mannu or his son Lala Soni Ram, the plaintiff, were in the position of mortgagors and mortgagees, the contention being that that period should be excluded from the computation of the 60 years provided by article 148 of the second schedule to Act XV of 1877, as between 1883 and 1898 no suit for redemption could have been brought by Mannu or after his death by the plaintiff Lala Soni Ram. Their Lordships are by no means certain that this particular contention was raised in the High Court. The contention there apparently was—not that the operation of article 148 was suspended during the period 1883—1898—but that by reason of the fusion of interests of mortgagor and mortgagee article 148 did not apply to this case and that the article which did apply was article 120. In support of the contention in this appeal this Board was urged to apply in this suit the principle which Lord Langdale, Master of the Rolls, applied when construing section 40 of 3 & 4 Will., IV, C. 27, in *Burrell v. The Earl of Egremont* (1). Their Lordships are unable to accede to that contention, as article 148 of Act XV of 1877 is essentially different in its language and intention from section 40 of 3 & 4 Will., IV, C. 27, and the facts upon which Lord Langdale acted were not in any way similar to the facts in this suit. Under section 40 of 3 & 4 Will., IV, C. 27, no suit could be brought to recover money secured on a mortgage or otherwise charged upon land, but within twenty years next after a present right to

(1) (1844) 7 Beav., 205.

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receive the same shall have accrued to some person capable of giving a discharge for or a release of the same, unless in one or other of the events specified in the section. The 60 years' period of limitation allowed by article 148 of Act XV of 1877 begins to run in such a case as this "when the right to redeem or to recover possession accrues." In *Burrell v. The Earl of Egremont* (1) there was a charge upon an estate which no assignable person was liable to pay and in respect of which no person was capable of making an acknowledgement that it was due. In this case the right to redeem the mortgage of the 2nd of January, 1842, accrued to the mortgagors the moment the mortgage was executed and the 60 years' period of limitation must be computed as having begun on the 3rd of January, 1842. There is nothing in Act XV of 1877 which would justify this Board in holding that, once that period of limitation had begun to run in this case, it could be suspended. Their Lordships consider that if they were to hold that, by reason of the fusion of interests between 1883 and 1898, the period of limitation was suspended, they would—this not being a suit to which the proviso to section 9 of Act XV of 1887 applies—be deciding contrary to the express enactment of that section that "when once time has begun to run no subsequent disability or inability to sue stops it."

At the hearing of this appeal two other contentions, each of which involved the consideration of facts and of law as applied to these facts, were raised. Neither of those contentions, so far as appears from the record which is before this Board, had previously been raised by anyone at any stage of this suit either in the Court of first instance or on either of the appeals, and consequently had not been considered either by the Subordinate Judge or the District Judge or the learned Judges of the High Court. Further, neither of these contentions is even suggested by any of the grounds of appeal which were set out in Lala Soni Ram's application to the High Court for leave to appeal to His Majesty in Council, nor is either of them suggested in the reasons contained in the case for the appellant here, and it must be remembered that this appeal has been heard *ex parte*, neither the respondents nor any counsel on their behalf having appeared. Their

(1) (1844) 7 Beav., 205.

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Lordships are not disposed to depart from the established practice of this Board not to allow on appeals to His Majesty in Council new cases to be made which were not made below.

The result is that their Lordships will humbly advise His Majesty that this appeal should be dismissed, and the decree of the High Court should be affirmed.

Appeal dismissed.

Solicitor for the appellant:—*Edward Dalgado.*

J. V. W.

APPELLATE CIVIL.

1918

January, 10

Before Mr. Justice Sir George Knox and Mr. Justice Muhammad Rafiq.

BACHCHAN LAL AND OTHERS (PLAINTIFFS) v. BANARSI DAS (DEFENDANT).
Civil Procedure Code (1908), order VIII, rule 6—Set-off—Claim barred according to lex fori, but not according to lex loci contractus.

In a suit filed against him in the United Provinces the defendant claimed to set off a debt, which, though it would have been barred by limitation in the United Provinces, was not barred according to the local law (that of the Punjab) applicable thereto. *Held* that the set-off claimed was admissible.

THE facts of this case, so far as they are material to the purposes of this report, are as follows. The plaintiffs sued to recover Rs. 3,200 from the defendant, who was a resident of Umbala in the Punjab, the money being alleged to be due as the result of dealings in flour between the parties. Amongst other defences, the defendant claimed to set off the amount due on a certain rukka for Rs. 200. This set-off was disallowed by the court of first instance upon the ground that the claim on the rukka was barred by limitation. On appeal by the defendant, however, the lower appellate Court reversed the finding of the court below on this point, holding that the local law of the Punjab applied to the rukka in question, according to which the debt was not time-barred. The plaintiffs appealed in respect of this and other matters to the High Court.

The Hon'ble Dr. Sundar Lal and Mr. A. P. Dube, for the appellants.

Babu Satya Chandra Mukerji, for the respondent.

KNOX and MUHAMMAD RAFIQ, JJ.:—The appellants before us in this second appeal were plaintiffs in the court of first instance.

* Second Appeal No. 1264 of 1911 from a decree of Austin Kendall, District Judge of Cawnpore, dated the 21st of August, 1911, modifying a decree of Mohan Lal Hukku, Subordinate Judge of Cawnpore, dated the 6th of July, 1910.

They sued the respondent for a sum of money together with costs. The sum of money, they claimed, was alleged to have arisen out of certain dealings in wheat between the parties. The sum which they sued for was Rs. 3,200. The lower appellate Court went into the accounts and gave the appellants a decree for Rs. 374-0-6 with proportionate costs. Against this decree the appellants have brought the present appeal. In the memorandum of appeal they have raised several pleas. One of these pleas, namely, plea No. 6, has been abandoned, and the pleas urged before us really resolve themselves into two, the first being that the lower appellate Court was wrong in debiting the appellants with the amount of a rukka dated the 7th of December, 1903, inasmuch as the claim on that rukka was barred by limitation.

The second point was that the account books produced by the respondent before the lower appellate Court had not been proved according to law. Before dealing with this we would note that the third plea in the memorandum of appeal is a plea calculated to get behind a finding of fact based upon evidence and of this we can take no account in second appeal. The second plea, which was to the effect that the lower court ought to have passed a preliminary decree under order XX, rule 16 of the Code of Civil Procedure, is not entitled to any weight. We agree with the learned Judge of the court below that this was not a case in which a preliminary decree was required.

As regards the action of the lower court with reference to the rukka, the contention was that the court ought to have in the present case applied the provisions of the Indian Limitation Act of 1908 without any reference to the provisions of the Punjab Act No. I of 1904. Reference was made to Dicey on the Conflict of Laws, rule 118, page 711. But the learned advocate overlooked altogether in his argument the provisions contained in the Code of Civil Procedure, vide order VIII, rule 6. This order and rule apply equally as law in these provinces as in the Punjab in suits for recovery of money. The defendant can claim to set off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff. Without going any further into the contention raised by the learned advocate, the sum due on the rukka was a sum which the defendant, if

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LALv.
BANARSI DAS.

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DAUD HU-
BAIN.

GRIFFIN and CHAMIER, JJ :—Balkishan and Mul Chand were brothers, separate in estate. Mul Chand died leaving a son Bhagirath. In execution of a decree obtained by Bhagirath a share in a village called Jaswan was put up for sale and purchased by, or at all events in the name of, Balkishan. The last named was succeeded by his son, Ganesh, who died in 1888, leaving a widow Musammat Gango. Bhagirath put forward a claim to the share in Jaswan. The dispute was referred to the arbitration of three persons, but before an award could be made the parties agreed that the share in Jaswan should go to Bhagirath and that a share in a village called Karauri, standing in the names of Ganesh and Bhagirath, should go to Musammat Gango, and at the same time other properties were allotted to one party or the other. An award was made in terms of this agreement. In 1904, Gango gave the share in Karauri to her daughter's son, the present plaintiff. She died in 1908. In 1892 Bhagirath sold the share in Jaswan to a Musammat Wali-un-nissa, from whom it was taken under a pre-emption decree by the predecessors of the defendants. Thus, there have been several dealings with the properties included in the award. In the present suit, instituted in 1910, the plaintiff seeks to recover the share in Jaswan on the ground that he is not bound by the compromise and award made thereon. The Subordinate Judge decreed the claim, but his decision was reversed by the District Judge, who upheld the compromise, on the ground that it was a reasonable settlement of the dispute between Musammat Gango and Bhagirath. The learned Judge was disposed to think that Balkishan and Bhagirath must have been joint owners of the share in Jaswan, as both were recorded as holders of *sir* and *khudkasht*, and Bhagirath's name remained in the *khassra* after the death of Balkishan. In second appeal it is contended that Musammat Gango being the holder of a limited interest in the property had no power to surrender it to Bhagirath in such a way as to bind the reversionary heirs of her husband. In our opinion there is no force in this contention. The case appears to be covered by the decision of the Privy Council in *Khunni Lal v. Gobind Krishna Narain* (1) and the decision of this Court in *Madan Lal v. Chuttan Singh* (2). The compromise which has been found to be a reasonable

(1) (1911) I. L. R., 33 All., 356. (2) (1912) 10 A. L. J., 101.

settlement was designed to put an end to a family dispute which would otherwise have resulted in ruinous litigation. On the authorities it is impossible to treat the compromise as an alienation, valid only if it can be shown to be justified by necessity. The appeal is dismissed with costs.

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Appeal dismissed.

Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

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February, 12.

MOHAN LAL (JUDGEMENT-DEBTOR) v. JAGAN NATH AND ANOTHER (DECREE-HOLDERS).*

Civil Procedure Code (1908), section 47—Execution of decree—Partition—Objection that decree-holders had realized certain debts assigned by the decree to the judgement-debtor—Procedure.

The decree in a partition suit, *inter alia*, allotted a sum of money to be paid by the judgement-debtor to the decree-holders and assigned certain debts on account books to the judgement-debtor. On application by the decree-holders for execution as to the sum allotted to them, the judgement-debtor took objection that the decree-holders had as a matter of fact realized a large amount out of the debts which had been assigned by the decree to him. *Held* that the question thus raised was not a matter falling within the purview of section 47 of the Code of Civil Procedure, and that the judgement-debtor's remedy was by a separate suit to recover from the decree-holders the amount alleged to have been illegally realized.

THIS appeal arose out of proceedings in execution of a decree based upon a compromise in a suit for the partition of the property of the family to which both parties belonged. Amongst this property were certain debts due on bonds and other debts due on account-books. Several of the bond debts were assigned to the plaintiffs, and the rest as well as the debts on account-books to the defendant. In addition to this the sum of Rs. 3,400 was to be paid by the defendants to the plaintiffs, Rs. 400 at once and the balance within two years. The sum of Rs. 400 was paid. In 1910 and 1911 there were applications made by the decree-holders in execution of the decree whereby they sought to recover the balance of Rs. 3,000. The present application for execution was made in January, 1912. On the 8th of March, 1912, the judgement-debtor filed certain objections. The objections were that the application was in contravention of the terms of the decree, that the application was time-barred, that interest had been charged by the

*First Appeal No. 205 of 1912 from a decree of Mohan Lal Hukku, Subordinate Judge of Meerut, dated the 25th of May, 1912.

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decree-holders to which they were not entitled, and that since the date of the partition decree the plaintiffs decree-holders had realized a large sum of money out of those debts which had been allotted to the judgement-debtor under the partition decree. On the 16th of March the objections were slightly amplified by another application in which the judgement-debtor sought for time to bring into court evidence to prove that the decree-holders had realized a large sum out of those debts based on account-books which had been allotted to the defendant.

The court of first instance disallowed the objections. The defendant judgement-debtor appealed to the High Court.

Pandit *Shiam Krishna Dar* and Pandit *Uma Shankar Bajpai*, for the appellant.

The Hon'ble Pandit *Moti Lal Nehru*, for the respondents.

TUDBALL and MUHAMMAD RAFIQ, JJ.:—This is an appeal arising out of execution proceedings. The facts are briefly as follows:—The parties are step-brothers. A suit for partition was brought by the plaintiffs respondents for partition of the joint family property. The suit ended in a decree, dated the 3rd of March, 1908, based on a compromise. The compromise is dated the 14th of January, 1908, and was filed in the course of the appeal in this Court, on the 22nd of January, 1908, and was remitted to the court below for verification and report. It reached the court below on the 31st of January, 1908. According to the compromise the landed property was divided in a certain manner, likewise the house property. With these we are not concerned in this appeal. The third class of property consisted of debts on bonds and on accounts entered in certain account-books. Of this class about ten debts secured by bonds were allotted to the plaintiffs. The remaining debts, including all those due on accounts, were allotted to the defendant. In addition to this allotment of the property under the compromise a sum of Rs. 3,400 was to be paid by the defendant. Of this, Rs. 400 was to be paid at once and the balance of Rs. 3,000 at the end of two years. The compromise on being duly verified was submitted to this Court, and a decree was passed thereunder on the 3rd of March, 1908. The sum of Rs. 400 was paid. In 1910 and 1911 there were applications made by the decree-holders in execution of the decree, whereby they sought to recover

the balance of Rs. 3,000. The present application for execution was made in January, 1912. On the 8th of March, 1912, the judgement-debtor filed certain objections. The objections were that the application was in contravention of the terms of the decree; that the application was time-barred; that interest had been charged by the decree-holders to which they were not entitled, and that since the date of the partition decree the plaintiffs decree-holders had realized a large sum of money out of those debts which had been allotted to the judgement-debtor under the partition decree. On the 16th of March the objections were slightly amplified by another application, in which the judgement-debtor sought for time to bring into court evidence to prove that the decree-holders had realized a large sum out of those debts based on account-books which had been allotted to the defendant. The lower court has disallowed the objections. The plea of limitation was not pressed, and the lower court held that if the decree-holders had wrongfully recovered the debts, the judgement-debtor had his remedy against the decree-holders in a regular suit. The judgement-debtor comes here on appeal, and the first plea taken is that the point raised as to the collection of debts due to the judgement-debtor by the decree-holders is a point which falls under section 47 of the Code of Civil Procedure and the lower court ought to have gone into it. To this we cannot agree. The appellant has an entirely a separate cause of action against the decree-holders, if the latter have as a matter of fact recovered the debts due to him and not to themselves. Once the final decree in the partition suit was passed, the plaintiffs, decree-holders, ceased to have any title whatever to the debts in question. It is not pleaded that the plaintiffs' decree for Rs. 3,000 has been satisfied. There has been no voluntary payment. It is further urged on behalf of the appellant that under clause (2) of section 47 we should treat his present petition of objection more in the nature of a plaint, so that the whole proceedings may be treated as a suit by him to recover the amount which he claims to have been collected by the decree-holders. We see no reason to do so, assuming for a moment that the second clause of the section enables us to do as he wishes. The present proceeding is one which has arisen out of an application by the decree-holders and the objections are merely objections asking the court to reject the application. No amount

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is specifically claimed therein as having been collected by the decree-holders.

The second ground of appeal is not pressed. The third ground of appeal has no force. Assuming that the respondents have misappropriated the money due to the appellant, the latter has a remedy by regular suit.

The fourth ground of appeal is that as the plaintiffs have refused to fulfil their obligations under the decree they are not entitled to recover the money from the appellant. In so far as the decree itself is actually concerned there is no obligation on the decree-holders which they have to perform. It is urged that on the 31st of January, 1908, when the compromise filed in this Court was received in the court below, an agreement was filed by the parties on the same day under which the plaintiffs, decree-holders, agreed to make over the account-books to the defendant. It is further urged that it was clearly understood by the parties that the defendant was to have two years' time given to him under the decree (as was actually granted thereby) for payment of Rs. 3,000, because he was to have the account-books at once handed over to him to enable him to recover the debts allotted to him. It is pleaded that the decree-holders have never handed over the accounts to him, and have thereby prevented him from recovering the debts, and as a consequence have prevented him also from paying the sum of Rs 3,000. It was urged that when the previous applications were made by the decree-holders this objection was all along taken, though it is also admitted that as a matter of fact it was not taken in the present instance in the court below. It seems to us quite clear that the rights of the parties, after the compromise had been arrived at, were governed by the decree of the 3rd of March, 1908. It may be that on a true interpretation of that decree the judgement-debtor was entitled to the possession of the account-books, as the debts based on those account-books were entered therein and they formed the chief proof of those debts. It was open to the judgement-debtor to put the decree into execution and to recover the books from the plaintiffs if they did not deliver them. As a matter of fact the decree is silent as to the possession of the account-books, and we do not think that we can go behind the decree to find out what other rights the parties may have. If any

portion of the compromise was accidentally omitted from the decree, it was open to the judgement-debtor to have the decree amended. If he intentionally omitted any portion of the compromise from the decree he has himself to blame. In any case he is not entitled to go behind the decree which finally decided the rights of the parties. This is a point which, as we have already pointed out, was not taken in the court below. If the appellant deems himself aggrieved in any way, we must leave him to his remedy by a separate suit. We think the decision of the court below is perfectly correct. We dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Sir Harry Griffin and Mr. Justice Chamier.

GANESHI LAL AND OTHERS (PLAINTIFFS) v. CHARAN SINGH AND OTHERS
(DEFENDANTS)*

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February, 15.

Mortgage—Parties—Suit for entire mortgage money and sale of entire mortgaged property—Omission to implead certain persons interested—Decree to which plaintiffs entitled.

Where a plaintiff mortgagee sued for the recovery of the whole of the mortgage money by the sale of the whole of the mortgaged property, but by an oversight omitted to implead certain persons who had acquired a share in the property subsequent to the mortgage in suit, it was *held*, that so much of the claim should be decreed as was proportionate to the interests of the persons who were before the court.

THIS was a suit on a mortgage made in favour of the first plaintiff in January, 1891. Some of the defendants were the mortgagors and remainder were impleaded on the ground that they had acquired an interest in the mortgaged property by purchase. One of the defences to the suit was that the plaintiffs had failed to implead four persons who had acquired one-sixth of the mortgaged property after the mortgage. The first court gave the plaintiffs a decree for $\frac{5}{6}$ ths of the amount due on the mortgage, to be recovered, if necessary, by sale of $\frac{5}{6}$ ths of the property mortgaged. The defendant appealed. The District Judge held that the non-joinder of owners of one-sixth of the property was fatal to the suit, which he accordingly dismissed.

The plaintiffs appealed to the High Court.

* Second Appeal No. 454 of 1912 from a decree of H. M. Smith, Additional Judge of Agra, dated the 29th of November, 1911, reversing a decree of Kalika Singh, Additional Subordinate Judge of Agra, dated the 27th of June, 1911.

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v.
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Dr. Satish Chandra Banerji and Babu Jogindro Nath Chaudhri, for the appellants.

Mr. M. L. Agarwala and Munshi Benode Behari, for the respondents.

GRIFFIN and CHAMIER, JJ.:—This was a suit on a mortgage made in favour of the first plaintiff in January, 1891. Some of the defendants were the mortgagors and the remainder were impleaded on the ground that they had acquired interest in the mortgaged property by purchase. One of the defences to the suit was that the plaintiffs had failed to implead four persons who had acquired one-sixth of the mortgaged property after the mortgage. The first court gave the plaintiffs a decree for $\frac{5}{6}$ ths of the amount due on the mortgage, to be recovered, if necessary, by sale of $\frac{5}{6}$ ths of the property mortgaged. The defendant appealed. The District Judge held that the non-joinder of the owners of one-sixth of the property was fatal to the suit, which he accordingly dismissed. In second appeal it is contended that the decision of the lower appellate court was erroneous. Reliance is placed on the decision in *Inam Ali v. Buij Nath Ram Sahu* (1) and some observations made by one of us in *Gendan Lal v. Babu Ram* (2). For the defendants respondents it is contended that a mortgagee must sue for recovery of the whole of the mortgage money by sale of the whole of the mortgaged property, and that if for any reason he is unable to ask for the sale of the whole mortgaged property his suit should be dismissed. In the present case the plaintiffs sued for recovery of the whole of mortgage money by sale of the whole of the mortgaged property. But by an oversight they omitted to implead certain persons who owned a share in the property distinct from the shares held by the other defendants. It seems to us that if the other questions in the case are decided in favour of the plaintiffs, so much of the claim should be decreed as is proportionate to the interest of the persons who are before the court. There seems to be some question as to whether the defendants are the owners of $\frac{5}{6}$ th or a smaller share. This matter may be determined by the lower appellate court. We allow the appeal, set aside the decree of the lower appellate court, and remand the case to that court to be restored to the

(1) (1906) I. L. R., 33 Cal., 613.

(2) (1911) 9 A. L. J., 86.

pending file and disposed of according to law. Costs will be costs in the cause.

Appeal allowed and cause remanded.

Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

JAI DEI (APPLICANT) v. BANWARI LAL, (OPPOSITE PARTY)*

Act No. VII of 1889 (Succession Certificate Act), section 9—Certificate in favour of Hindu widow to realize interest only—Certificate ultra vires.

Held that, where a certificate was granted to a Hindu widow for collection of debts due to her late husband, it was not competent to the Court, in lieu of requiring security from the grantee, to give a certificate for realization of interest only without disturbing capital. *Shib Dei v. Ajudhia Prasad* (1) referred to.

IN this case one Musammat Jai Dei, a Hindu widow, applied under section 6 of the Succession Certificate Act, 1889, for a certificate in respect of four debts due to her late husband. The application was opposed by certain reversioners, who asked the court to take security from the widow, as there was every likelihood of her wasting the corpus of the property if it reached her hands. On that the Judge passed the following order:—"The certificate asked for is granted, with the condition that the applicant may not disturb the capital sum and shall draw interest only." Musammat Jai Dei appealed to the High Court, urging that the order in question was *ultra vires* the condition imposed being one which it was not in the power of the court to annex to the grant of a certificate.

Dr. Surendra Nath Sen, for the appellant.

The Hon'ble Dr. Tej Bahadur Sapru, for the respondents.

TUDBALL and MUHAMMAD RAFIQ, JJ:—The appellant Musammat Jai Dei applied under section 6 of Act VII of 1889, the Succession Certificate Act, in respect of four debts due to her deceased husband. The application was opposed by certain reversioners, who asked the court to take security from the widow, as there was every likelihood of her wasting the corpus of the property if it reached her hands. On that the District Judge passed the following order:—"The certificate asked for is granted with the condition that the applicant may not disturb the capital sum and shall draw interest

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February, 18.

* First Appeal No. 148 of 1912 from an order of T. L. Johnston, District Judge of Farrukhabad, dated the 1st of August, 1912.

(1) F. A. f. O., No. 108 of 1910, decided on the 18th of February, 1911.

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v.
BANWARI
LAL.

only. This will obviate the necessity for security." Musammat Jai Dei has come here on appeal, and it is urged that the condition imposed by the court is *ultra vires* and that so much of the order passed is illegal. The case is similar in all respects to the case of *Musammat Shib Dei v. Ajudhia Prasad* (1), decided on the 13th of February, 1911. As in that cause, all that the Court could do was to require as a condition precedent to grant of the certificate that the widow should give security under section 9 for rendering an account of the debts and securities received by her and for indemnifying the persons who may be entitled to the whole or any part of the debt. The certificate as granted by the Judge would only entitle the widow to recover from the debtors the interest on the debts. It is not a question of the—"securities and interest on securities"—as defined in section 3 of the Act. We set aside the order of the Court below and direct that Court to readmit the application and to proceed to enter into and decide as to whether or not there is any necessity to take security from the widow under the circumstances. The parties will be allowed to go into evidence on the point and on that evidence the Court will come to a conclusion. If it comes to the conclusion that security is necessary, it will grant a certificate conditional on her furnishing security. If it comes to the conclusion that security is not necessary, it will grant a certificate unconditionally. The costs of this appeal will abide the result.

Appeal allowed.

1913

February, 18.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Banerji.
PARSOTAM DAS AND OTHERS (PLAINTIFFS) v. PATESRI PARTAB NARAIN
SINGH AND OTHERS (DEFENDANTS).*

Act No. III of 1877 (Indian Registration Act), section 21—Registration—How far a misdescription of property comprised in a deed may invalidate registration.

Where one of several villages comprised in a registered mortgage deed was described as being in a wrong tappa, the description being, notwithstanding this error, sufficient for identification, it was *held* that the misdescription was not sufficient to invalidate the mortgage as regards the village in question. *Behi Madho Singh v. Jagat Singh* (2) referred to.

THIS was a suit for sale on a mortgage. The mortgage comprised several villages and was registered, but the court of first

* First Appeal No. 219 of 1911 from a decree of Shiva Prasad, Subordinate Judge of Gorakhpur, dated the 15th of December, 1910.

(1) F. A. f. O., No. 108 of 1910. (2) (1912) 10 A. L. J., 38.

instance had held it to be invalid as against one of the villages upon the ground of misdescription with reference to section 21 of the Indian Registration Act, 1877. The village in question was thus described in the deed:—"The entire mauza Rasulpur, tappa Padya, . . . pargana and district Basti . . . which are mortgaged with possession to other persons." The rest of the description was correct, but the village was not situate in tappa Padya, but in tappa Kadar.

The plaintiffs appealed to the High Court.

The Hon'ble Dr. *Sundar Lal*, Munshi *Govind Prasad* and Maulvi *Shafi-uz-zaman*, for the appellants.

Dr. *Satish Chandra Banerji*, The Hon'ble Dr. *Tej Bahadur Sipru*, Maulvi *Muhammad Ishaq*, Munshi *Parmeshwar Dayal* and Munshi *Purushottam Das Tandan*, for the respondents.

RICHARDS, C. J., and BANERJI, J.—This appeal arises out of a suit for sale upon a mortgage, and the only question we have to determine is whether the court below was right in dismissing the claim in so far as it sought to bring to sale the village Rasulpur, tappa Kadar. The court below has held that having regard to the provisions of section 21 of the Registration Act of 1877 the registration of the mortgage deed as regards that village was void and it has accordingly dismissed the claim in respect of that village. The correctness of this decision is challenged in this appeal by the plaintiffs.

The mortgage comprises a number of villages, among which is the village Rasulpur, and it is thus described in the deed. "The entire mauza Rasulpur, tappa Padya, . . . pargana and district Basti . . . which are mortgaged with possession to other persons". Mauza Rasulpur is not in tappa Padya, but is in fact in tappa Kadar. This is established by the evidence to which the court below has referred, but it is admitted that it is situate in pargana Basti and in the Basti district, and it was also mortgaged with possession to other persons. The court below holds that as the tappa in which the property in question is situate has been wrongly given in the mortgage deed, the registration of that document is thereby vitiated. Section 21 of the Registration Act merely provides that a non-testamentary document relating to immovable property should contain a

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v.
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PARTAB
NARAIN
SINGH.

1913

February, 20.

Before Mr. Justice Sir Harry Griffin and Mr. Justice Chamer.
**BADRI PRASAD AND ANOTHER (PLAINTIFFS) v. ABDUL KARIM AND
 OTHERS (DEFENDANTS).***

*Act No. I of 1872 (Indian Evidence Act), section 68—Mortgage—Evidence of
 execution—Attesting witness—Scribe.*

Held that the scribe of a mortgage deed cannot be counted as an attesting witness merely because he has signed the deed, even though the deed may in fact have been executed in his presence. To be an "attesting witness" within the meaning of section 68 of the Indian Evidence Act, 1872, the witness must have seen the document executed and have signed it as a witness.

Ranu v. Lazmanrao (1); *Burdett v. Spilsbury* (2) and *Shamu Patter v. Abdul Kadir Ravathan* (3) followed. *Radha Kishen v. Fateh Ali Khan* (4), *Raj Narain Ghosh v. Abdul Rahim* (5) and *Muhammad Ali v. Jafar Khan* (6) discussed.

THE facts of this case were as follows:—The plaintiffs sued upon a mortgage bond. They produced none of the attesting witnesses to prove the bond, although one of them was alive and procurable. They produced the scribe, Ghulam Jilani, who stated that at the request of the executant, who was illiterate, he had signed the executant's name for him and that the executant had touched the pen. He also stated that the consideration was paid in his presence. Ghulam Jilani had signed the bond as a scribe and not expressly as an attesting witness. The Munsif held the bond proved. On appeal the District Judge held that the bond was not duly proved and dismissed the suit. The plaintiffs appealed to the High Court.

Maulvi Muhammad Ishug, for the appellants:—

A scribe who has signed his name on the deed and who is in a position to give evidence as to the execution thereof may be considered to be an attesting witness although he has not signed specifically as such. The evidence of such a scribe is legally sufficient to prove the bond; *Muhammad Ali v. Jafar Khan* (6), *Radha Kishen v. Fateh Ali Khan* (4). To be an attesting witness a person need not describe himself as such on the deed,

* Second Appeal No 183 of 1912 from a decree of D. R. Lyle, District Judge of Shahjahanpur, dated the 5th of December, 1911, reversing a decree of Iftikhar Husain, Munsif of Budaun West, dated the 18th of May, 1911.

(1) (1908) I. L. R., 33 Bom., (4) (1898) I. L. R., 20 All., 532.

44.

(2) (1843) 10 O. and F., 340.

(5) (1901) 5 O. W. N., 454.

(3) (1912) I. L. R., 35 Mad.,

(6) Weekly Notes, 1897, p. 146.

607.

nor is it necessary that his name should appear on a particular part of the document, e.g. the margin, rather than on any other part of it. He is an attesting witness if the execution of the document has happened in his presence, and he is able to testify to it. I am further supported by the cases of *Raj Narain Ghosh v. Abdur Rahim* (1) and *Dinamoyee Debi v. Bon Behari Kapur* (2). At all events the District Judge should have granted our prayer for an opportunity to produce the attesting witness who is alive.

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Munshi Govind Prasad, for the respondents:—

In order to be an attesting witness within the meaning of section 68 of the Evidence Act it is necessary that the witness should have seen the deed executed and have signed the deed as a witness of that fact. A scribe who signs the deed merely as the writer thereof, and not as purporting to be a witness of the execution, is not an attesting witness. I rely on the cases of *Ranu v. Laxmanrao* (3) and *Shamu Patter v. Abdul Kadir Ravuthan* (4). The appellants who deliberately failed to call the attesting witness have no right to be given an opportunity to call him now.

Maulvi Muhammad Ishaq replied.

GRIFFIN and CHAMIER, J. J.:—This was a suit upon a mortgage for Rs. 99 made in December, 1884. The claim was decreed by the first court, but was dismissed by the District Judge on appeal on the ground that the mortgage deed had not been proved as required by section 68 of the Evidence Act.

The only witness called to prove the execution of the deed was Ghulam Jilani, the man who wrote out the deed. He deposed that the deed was executed in his presence. The question is whether he was an attesting witness within the meaning of section 68 of the Evidence Act. He signed his name on the deed in the usual way, but he did so for the purpose of showing that it had been written out by him, not for the purpose of showing that he was an attesting witness. In fact there can be no doubt that he wrote his name on the deed before the deed was signed by the executant. The appellants rely upon the decision of BURKITT J.

(1) (1901) 5 C. W. N., 454.

(3) (1908) I. L. R., 33 Bom., 44.

(2) (1902) 7 C. W. N., 160.

(4) (1912) I. L. R., 35 Mad., 607.

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in *Radha Kishen v. Fatch Ali Khan* (1) in which it seems to have been held that section 68 had been complied with where the plaintiff had called "scribe of the deed, who, though not an attesting witness, had affixed his name to the deed and who swore that the deed had been executed in his presence". That decision was cited with approval by HARRINGTON J. in *Raj Narain Ghosh v. Abdur Rahim* (2). BURKITT J. professed to follow the decision of BANERJI and AIKMAN J. J. in *Muhammad Ali v. Jafar Khan* (3). We do not think that those learned judges intended to hold in that case that a man should be regarded as an attesting witness merely because he had written out the deed and signed his name on it and sworn that the deed was executed in his presence. We think that they intended to hold only that if the writer of a deed signed it with a view to testifying to the fact of the execution he would be an attesting witness although he was not so described on the face of the deed. Unless the report of the case of *Radha Kishen v. Fatch Ali Khan* is misleading, we think that BURKITT J. must have misinterpreted the decision of BANERJI and AIKMAN JJ.

In *Ranu v. Laxmanrao* (4) it was held, following *Burdett v. Spilsbury* (5), that an attesting witness was a witness who had seen the deed executed and who had signed it as a witness. In the recent case of *Shamu Patter v. Abdul Kadir Ravuthan* (6) their Lordships of the Privy Council quoted the decision in *Burdett v. Spilsbury* with approval, and in particular approved of the statement of the Lord Chancellor that "the party who sees the will executed is in fact a witness to it and if he subscribes as a witness he is then an attesting witness". They held that the word "attested" in section 59 of the Transfer of Property Act was used in that sense. It is evident that the word 'attesting' in section 68 of the Evidence Act is used in the same sense. Ghulam Jilani may have witnessed the execution of the deed now in suit, but he did not sign the deed as a witness. We must therefore hold that he is not an attesting witness and the production of his evidence was not a compliance with section 60 of the Evidence Act. We think, however, that the case should go back to the lower

(1) (1888) I. L. R., 20 All., 532.

(4) (1908) I. L. R., 33 Bom., 44.

(2) (1901) 5 O. W. N., 454.

(5) (1843) 10 C. and F., 340.

(3) Weekly Notes, 1897, p. 146.

(6) (1912) I. L. R., 35 Mad., 607.

appellate court in order that the plaintiffs may have an opportunity of producing further evidence. Ghulam Jilani stated that one of the attesting witnesses was still alive. The decision of BURKITT J. justified the plaintiffs in supposing that they had complied with law. There is before us an affidavit that the plaintiffs asked the District Judge to give them an opportunity of producing other evidence. We allow the appeal, set aside the decision of the lower appellate court and remand the case to that court in order that it may be disposed of according to law with reference to the above remarks. Costs in this Court to be costs in the cause.

Appeal allowed and cause remanded.

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v.

ABDUL KARIM.

MISCELLANEOUS CIVIL.

Before Mr. Justice Sir Harry Griffin and Mr. Justice Muhammad Rafiq.

JAIRAJ MAL (APPLICANT) v. RADHA KISHAN AND ANOTHER (OPPOSITE PARTIES.)*

1913

February, 22.

Civil Procedure Code (1882), section 287 (c)—Execution of decree—Mortgage on property sold notified at time of sale—Subsequent suit on mortgage—Auction purchaser not estopped from questioning validity of mortgage.

In proceedings in execution of a decree a person alleging himself to be the mortgagee of property about to be sold asked the executing court to notify the existence of his prior incumbrance on the property to be sold, and the Court, without apparently making any inquiry as to the genuineness of the mortgage, did so, but did not sell the property subject to the prior incumbrance. The property was sold and purchased by the decree-holder.

Held on suit by the mortgagee that the decree-holder auction purchaser was not estopped from contesting the validity of the mortgage so notified. Shib Kunwar Singh v. Sheo Prasad Singh (1) followed.

THE facts of this case were as follows :—

Muhammad Mushtaq executed a mortgage on the 14th of January, 1895, in favour of Radha Kishan. The mortgage was unregistered. In execution of a decree against Muhammad Mushtaq, Jairaj Mal attached and put up to sale the property of Muhammad Mushtaq which had been mortgaged. Thereupon Radha Kishan applied, on the 19th of September, 1904, to the execution court that the amount due to him under the mortgage might be notified along with the decretal amount: and on the same day the court passed the order :—"Let the amount be notified." This was done.

Civil Miscellaneous No. 377 of 1912.

(1) (1906) I. L. R., 23 All., 414.

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The property was put up to auction and purchased by Jairaj Mal. Subsequently, Radha Kishan sued on his mortgage, when Jairaj Mal raised the defence that the mortgage was fictitious and without consideration. The court of first instance gave effect to this plea, and dismissed the suit. The court of first appeal reversed this decision, being of opinion that Jairaj Mal was estopped from raising this plea, for the reason that he had not raised any objection when the mortgage was ordered to be notified. This view was upheld by the court of second appeal. Thereupon Jairaj Mal petitioned for a reference, and the case was referred to the High Court for opinion under rule 17 of the Kumaun Rules.

Mr. *Agha Haidar*, for the petitioner (defendant), contended that the application made by Radha Kishan was not a claim or objection coming under section 278 of the old Code of Civil Procedure. He merely asked that the amount of his lien might be notified in the sale proclamation. The court held no investigation into the matter and the property was not put up for sale subject to mortgage. If the court had intended to do that it would have said so. The order was not passed under section 282 of the Code. The mortgage was simply notified under section 287 (c). Under such circumstances the auction-purchaser was not debarred from raising the plea that the mortgage was fictitious and without consideration. He relied on the case of *Shib Kunwar Singh v. Sheo Prasad Singh* (1).

Dr. *Satish Chandra Banerji* (with him Mr. *J. M. Banerji*), for the opposite party (plaintiff), contended that the ruling cited by the applicant could not apply to the facts of the present case. Here the decree-holder himself, who eventually became the auction-purchaser, had acquiesced in the proclamation of the lien. If the mortgage was fictitious he should have opposed the application to have the lien notified. But he agreed to the notification being made, and thus joined in the representation that only the equity of redemption was being sold, with the result that he was able to purchase the property for a small price. His conduct estopped him. Besides, there was nothing to show that the court did not inquire into the validity of the mortgage, and every presumption should be made in favour of the regularity of the court's proceedings.

(1) (1906) I L. R., 28 All, 418.

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lays down that a person in the position of Jairaj Mal is not debarred from proving that the mortgage set up by the plaintiff was fictitious and without consideration. This being our opinion on the question of law involved, we think that the proper course to be adopted is to send the case back to the first appellate court for disposal of the other pleas in the appeal. We are further of opinion that costs of this reference should be costs in the cause, and that costs should abide the result.

Answer accordingly.

APPELLATE CRIMINAL.

1913
 February, 24.

Before Mr. Justice Sir Harry Griffin and Mr. Justice Channier.

EMPEROR v. GULABU.*

Act No. I of 1872 (Indian Evidence Act), section 91—Evidence, admissibility of—Confession made to inquiring magistrate, but not recorded by him in writing—Criminal Procedure Code, sections 364 and 533.

Held that a confession of an accused person made to a magistrate holding an inquiry is a matter required by law to be reduced to the form of a document within the meaning of section 91 of the Indian Evidence Act, 1872, and that no evidence can be given of the terms of such a confession except the record, if any, made under section 364 of the Code of Criminal Procedure. Section 533 of the Criminal Procedure Code has no application to a case where no record whatever has been made of such a confession.

THIS was an appeal on behalf of the Local Government against an order of acquittal passed by the Sessions Judge of Saharanpur. The accused in this case made a confession before a Tahsildar who was holding an inquiry as a Magistrate. The Tahsildar did not record the confession in writing. At the trial the Tahsildar offered oral evidence of what the accused had stated to him in the confession. The Sessions Judge held that this evidence was inadmissible, and, there being no other evidence upon which much reliance could be placed, acquitted the accused.

The Government Advocate (Mr. A. E. Ryves), for the Crown, contended that oral evidence of the confession was admissible. A confession made to a private individual might be proved by the oral evidence of that individual, and there was no provision of law which prohibited such a course when the individual to whom the confession was made was a magistrate holding an inquiry.

*Criminal Appeal No. 37 of 1913 by the Local Government, from an order of W. J. D. Burkitt, Sessions Judge of Saharanpur, dated the 13th of September, 1912.

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EMERSON

P.
GULABU.

magistrate recording the confession, it shall take evidence that such person duly made the statement recorded, and, notwithstanding anything contained in the Indian Evidence Act, section 91, such statement shall be admitted if the error has not injured the accused as to his defence on the merits. This reference to section 91 of the Evidence Act shows that the Legislature intended that the provisions of that section should apply to the case of a confession made by an accused person to a magistrate holding an inquiry. Reading section 364 of the Code of Criminal Procedure with section 91 of the Evidence Act we must hold that a confession of an accused person made to a magistrate holding an inquiry is a matter required by law to be reduced to the form of a document within the meaning of the latter section, and that no evidence can be given of the terms of such a confession except the record, if any, made under section 364. Section 533 has no application to a case where no record whatever has been made of such a confession. The learned Government Advocate is unable to refer to any case in which oral evidence of the terms of a confession made to a magistrate during the course of an inquiry has been admitted, and we know of no case in which this has been done. Apart from this objection to the reception of oral evidence of the confession, we would point out, as the learned Sessions Judge has done, that the confession was made under peculiar circumstances. It is more than doubtful whether it was made voluntarily. The evidence of the Tahsildar shows that it was made after the Tahsildar had arrested the accused and told him that evidence had been obtained which showed that he had committed murder. The Tahsildar admits that he took no steps to ascertain whether the confession was made voluntarily or under pressure. Lastly, assuming that the confession can be admitted in evidence, we do not think that the case calls for further inquiry. The only evidence in support of the alleged confession is the statement of a man named Jaswant. At the trial this man gave evidence to the effect that the woman had died as the result of a miscarriage. A previous statement made by the witness to the Tahsildar on the 24th of April, 1912, was put to him and he denied that he had made it, but he said that through fear he had told the Tahsildar that Gulabu had brought out the body and that blood was then oozing from the mouth and the nostrils.

The statement made by the witness on the 24th of April, 1912, in the absence of the accused, is not admissible in evidence under section 288 of the Code of Criminal Procedure. The witness was examined again by Cantonment Magistrate on the 4th of June and he then admitted that he had made the statement of the 24th of April and also admitted that it was true. It is possible that the statement of the 24th of April might be treated as having been incorporated in and so forming part of the statement of the 4th of June which was made in the presence of the accused. If so, it might be admitted under section 288 of the Code of Criminal Procedure. But on the 4th of June, while admitting the truth of his previous statement of April 24th, Jaswant made other statements wholly inconsistent with that statement. It is impossible to place much reliance on such a witness. It seems to us that, even if the confession were admitted in evidence, it would be unsafe to rely on it and that the other evidence is wholly insufficient to justify a conviction. We therefore dismiss this appeal and direct that Gulabu be set at liberty.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Sir Harry Griffin and Mr. Justice Chamier.

JHUNKA PRASAD (PLAINTIFF) v. NATHU (DEFENDANT) *

Hindu law—Adoption—Ahirs—Validity of adoption after marriage of adopted son.

Held that amongst Ahirs the adoption of a son after his marriage has taken place is not permissible. *Pichurayyan v. Subbayyan* (1) followed.

THE plaintiff in this case sued on the allegation that over six years ago the defendant, who was his paternal uncle, had adopted him with all due ceremony. He claimed a declaration of title and possession of his share of the family property by partition. The defendant admitted the *factum* of the adoption, but pleaded that it was invalid in law for the reason that at the time of the adoption the plaintiff was a married man with a daughter of his own. The parties were *ahirs* by caste. Both the lower courts gave effect to

* Second Appeal No. 435 of 1912 from a decree of W. H. Webb, Additional Judge of Saharanpur, dated the 8th of February, 1912, confirming a decree of Jawwad Husain, Subordinate Judge of Saharanpur, dated the 17th of July, 1911.

(1) (1889) I. L. R., 13 Mad., 123.

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EMPEROR
v.
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February, 26

1913

KASTURI
V.
CHIBANZI
LAL.

THE facts of this case were as follows:—

The appellant Mt. Kasturi, a *sonar* (goldsmith) girl of about 16 years of age, lived after the death of her parents with her paternal relatives, namely, an uncle and two cousins. She had an younger brother. After she had lived for some months with these relatives, they brought her to the house of the plaintiff, a relative of theirs, and she lived there for about a month and a half. The paternal relatives were negotiating a not very suitable marriage for her, for pecuniary consideration. In the meantime the maternal relatives of the girl arranged her marriage with the plaintiff, and she was married to him in the presence and with the consent of her maternal grandfather, but without the knowledge of the paternal relatives. The latter came to the plaintiff's house on the day after the marriage and took the girl away with them. The plaintiff thereupon brought the present suit for restitution of conjugal rights. Mt. Kasturi and the other defendants resisted the claim. Both the lower courts found that the marriage had been performed with all due religious ceremony, that the girl's consent had not been forced, and that no fraud had been employed. Both the courts decreed the suit.

The defendants appealed to the High Court.

Mr. *Nihal Chand*, for the appellants:—

Under the Mitakshara the right of guardianship over a minor girl, including the right of giving her in marriage, vests in the following persons in successive order, namely, father, paternal grand-father, brother, other paternal relations (*Sakulya*), mother. The maternal grand-father does not find a place on the list. The right is with the paternal relations, and the mother only comes in as the last on the list which ends with her; Macnaghten, *Principles and Precedents of Hindu Law* (3rd Edition), page 104; and page 204 of the second volume (Appendix). It is only under the Bengal School that the maternal relatives find a place on the list: Banerjee, *Hindu Law of Marriage and Stridhan* (1879 Edition), page 47; Bhattacharya, *Hindu Law* (3rd Edition), Vol. I, page, 234. Yajnavalkya's order enumerated above is accepted in the Mitakshara and in the law all over India, except Bengal. The maternal grandfather, accordingly, is not a legal guardian at all and has no authority to bestow the minor in marriage. In

this case, the father and paternal grandfather being dead and the brother being a minor, the paternal uncle is the legal guardian. The marriage is, therefore, invalid and can be set aside. Force or fraud are not the only grounds on which a Hindu marriage can be annulled. Any sufficient reason affecting the propriety of the marriage may afford a ground for avoiding it; Banerjee, *Hindu Law of Marriage and Stridhan* (1879 Edition), page 53. *Anjona Dossee v. Proladh Chunder Ghose* (1). The girl has clearly signified her unwillingness to recognize this marriage. She has attained years of discretion and her wishes should be an important factor in considering the propriety or otherwise of the marriage. She never lived with the plaintiff after the marriage. The cases of *Ghazi v. Sukru* (2) and *Venkatacharyulu, v. Rangacharyulu* (3), which are relied on by the lower courts, can be distinguished. There the girl was bestowed in marriage by the mother, who is one of legal guardians recognized by the *Mitakshara*.

Babu *Durga Charan Banerji*, for the respondent :—

Under the Benares School of Hindu Law the maternal grandfather and other maternal relatives do find a place on the list of guardians of a female minor. Yajnavalkya and the *Mitakshara* stop at the mother. But the list is not exhaustive, and other commentators of the same school continue the list further on and include the maternal grandfather and others, e.g., the sages Narada and Vishnu do so; *Bhattacharyya, Hindu Law* (3rd Edition) Volume I, pages 233 and 234; *Mayne, Hindu Law* (7th Edition), page 101.

The difference between the Benares and Bengal Schools on this point is with regard to the relative position of the mother on the list. The former puts the mother before, and the latter after the maternal grandfather and maternal uncle; *Trevelyan, Hindu Law*, pages 42 and 43. Secondly, the rules relating to guardianship are of importance so long as the marriage rests in contract. A very different question arises where the marriage has actually been celebrated. If the marriage is duly solemnized, and there is no force or fraud, it is irrevocable. The rules are directory and not mandatory; *Mayne, Hindu Law* (7th Edition),

(1) (1870) 14 W. R., C. R., 403.

(2) (1897) I. L. R., 13 All., 516.

(3) (1890) I. L. R., 14 M.A., 216.

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page 102. *Gopal Chandra Shastri, Hindu Law*, pages 109 and 110.

I rely also on the ruling mentioned by the appellants. The finding is that the marriage with the plaintiff is a fairly suitable one, and that there was no force or fraud employed to compel the consent of the girl to marriage with him. There are no sufficient grounds on which the marriage can be set aside.

Mr. Mohd. Ghani, in reply:—

Narada and Vishnu are not regarded as authorities in the Benares School; Bhattacharyya, *Hindu Law* (3rd Edition), Volume I, page 78, where Narada and Vishnu are not enumerated in the list of authorities followed by the Benares School. These texts, therefore, cannot override the *Mitakshara*, which is of paramount authority in these Provinces.

GURPIN and CHAMBER, JJ.:—This is an appeal in a suit brought by the respondent for restitution of conjugal rights. The courts below have found that the appellant Musammât Kacturi was given in marriage to the respondent by her maternal grandfather and maternal uncle against the wishes of the appellants, Mangal, Balnakund and Joti, who are paternal uncle and paternal cousins of the girl, and who hoped to make a profit out of marrying her to a rich but one-eyed man named Tulshi. It has been found also that the marriage was not brought about either by force or by fraud.

The question for decision is whether the marriage is valid. The authorities are conflicting. According to Yajnavalkya (I-63-64) the father, paternal grandfather, brother, a Sakulya or member the same family, and the mother, in default of the first among these the next in order, if sound in mind, is to give a damsel in marriage. Vishnu says (XXIV-38-39):—"The father, the paternal grandfather, the brother, the kinsman, the maternal grandfather, and the mother are the persons by whom a damsel may be given in marriage." Narada says (XII-20-21):—"The father himself shall give a damsel in marriage or with his assent the brother, the maternal grandfather and maternal uncle and her agnates and her paternal grandfather. In default of all these the mother." The *Mitakshara*, commentary on the text of Yajnavalkya, is silent about the maternal relations (I. VII, 3-6). Most of the

modern commentators seem to assume that the text of Yajnavalkya and the Mitakshara commentary upon it should not be treated as exhaustive and that the maternal relatives may give a girl in marriage, though the father, brother and other paternal relatives have a preferential right to do so (see Macnaghten's Hindu Law, edition of 1874, page 103; Guru Das Banerjee's Hindu Law of Marriage and Stridhan, page 47; Trevelyan's Hindu Law, page 43; Ghose's Hindu Law, pages 678-688, and Mayne's Hindu Law, 7th edition, page 101). Others, such as J. N. Bhattacharjee, Chapter XIII, and Golap Chandra Shastri, Chapter III, content themselves with noticing the divergence between the authorities. It has been established by a long line of decisions, going back to 1843 that if a girl is given in marriage by her natural guardian even without the consent of her legal guardian and the marriage actually takes place, it is irrevocable [see *Ghazi v. Sukru* (1), *Venkatacharyulu v. Rangacharyulu* (2), *Surjyamoní Dasi v. Kali Kantu Dás* (3) and *Mulchand v. Bhudhia* (4)] and we are asked to apply this rule to the present case. But on the findings of the courts below it may be doubted whether the persons who gave the girl in marriage were her natural guardians. It appears that her mother died several years ago; that her father died seven or eight months before the marriage now in question, and that she and her brother aged ten lived with their paternal uncle and cousins up to within a month or two before the marriage when they took her to the respondent's house.

We have not been referred to any case at all resembling the present case. But on the other hand, there is no case, of which we are aware in which the marriage of a Hindu girl effected without force and fraud by her relations has, after it has actually taken place, been declared to be invalid for want of the consent of the legal guardian. Neither Yajnavalkya nor the Mitakshara lays down that the marriage of a girl effected without the consent of her legal guardian is invalid. In the case of *Khushalchand v. Bai Mani* (5) the Court held that the texts on the subject were directory rather than mandatory, that the consent of the legal guardian was not necessarily of the essence of the marriage, and

(1) (1879) I. L. R., 19 All., 515.

(3) (1900) I. L. R., 28 Cal., 37.

(2) (1890) I. L. R., 14 Mad., 316.

(4) (1897) I. L. R., 22 om., 812.

(5) (1886) I. L. R., 11 Bom., 247.

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that it would be proper to apply the principle of *factum valet* to a marriage effected without such consent, but also without either force or fraud. In the present case the girl was sixteen years old at the time of the marriage: she appears to have entered upon it not unwillingly, and the object which her paternal relatives had in view in opposing her marriage with the respondent, and now have in view in resisting this suit, is the getting of a sum of money upon what would be something very like a sale of the girl to the one-eyed man Tulshi. It seems to us that this is eminently a case to which the principle of *factum valet* should be applied. We therefore hold that the marriage cannot now be declared void. The appeal fails and is dismissed with costs.

Appeal dismissed.

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February, 26.

Before Mr. Justice Banerji and Mr. Justice Tudball.

INDARJIT AND OTHERS (DEPENDANTS) v. GAJADHAR SAHAI (PLAINTIFF)
AND DHANPAT RAI AND OTHERS (DEPENDANTS)*

Act No. IX of 1871 (Indian Limitation Act), section 21—Act No. IX of 1908 (Indian Limitation Act), section 31—Limitation—Mortgage with possession—Realization of rents and profits equivalent to receipt of interest as such under the terms of the mortgage.

Under the terms of a mortgage deed executed in 1850 the mortgagee was to take possession of the mortgaged property and appropriate the rents and profits in lieu of interest. The mortgagee remained in possession up to 1889 when he was dispossessed. In 1910 he brought a suit for sale. *Held*, that the realization of rents and profits in lieu of interest was equivalent to the receipt of interest as such under the terms of the mortgage and therefore under section 21 of Act No. IX of 1871 the mortgagee was entitled to compute limitation from the year 1889. Act No. XV of 1877 having by that time come into operation, the plaintiff was in 1910 entitled to bring his suit within the limitation provided by section 31 of Act No. IX of 1908.

THIS was a suit for sale upon a mortgage executed in 1850. The mortgage was usufructuary, the rents and profits being taken in lieu of interest on the mortgage money. The plaintiff remained in possession and realized the rents and profits down to the year 1889, when he was dispossessed. The present suit was brought in 1910. Both the lower courts decreed the claim. The defendants mortgagors appealed to the High Court, and the only point raised in appeal was that the suit was barred by limitation before Act

* Second Appeal No. 572 of 1912 from a decree of H. Dupernex, District Judge of Farrukhabad, dated the 3rd of February, 1912, confirming a decree of Joti Sarup, Munsif of Kaimganj, dated the 5th of December, 1910.

No. XV of 1877 came into force, and therefore the plaintiff was not entitled to the benefit of section 31 of Act No. IX of 1908.

Babu *Jogindro Nath Chaudhri*, for the appellants.

The Hon'ble Pandit *Moti Lal Nehru*, for the respondents.

BANERJI and TUDBALL, JJ.:—This appeal arises out of a suit for sale upon a mortgage of the 26th of January, 1850. The question to be decided is whether the suit is barred by limitation. The mortgage deed provided that the mortgagee was to take possession and appropriate the rents and profits in lieu of interest. It has been found by the court below that in pursuance of this clause in the mortgage deed the mortgagee was in possession till the year 1889, when he was dispossessed. It is argued that the claim had become time-barred before Act XV of 1877 came into operation, and, therefore, the plaintiff was not entitled to the benefit of section 31 of the Limitation Act of 1908. Section 21 of Act IX of 1871 gave a fresh start for the computation of limitation from the date of payment of interest as such. The realization of rents and profits in lieu of interest was equivalent to the receipt of interest as such under the terms of the mortgage and, therefore, under section 21 of Act IX of 1871, the plaintiff was entitled to compute limitation from the year 1889, up to which year he has been found to have received interest. Before that date Act XV of 1877 had come into operation. Therefore in accordance with the provisions of section 31 of Act IX of 1908 the plaintiff was entitled to bring his suit within two years of the date on which that Act came into force. The suit having been brought on the 10th January, 1910, was well within time. The only point raised therefore fails. We dismiss the appeal with costs.

Appeal dismissed.

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Before Mr. Justice Sir Harry Griffin and Mr. Justice Chamier.

DHANPAL SINGH (PLAINTIFF) v. BUDEH SINGH AND ANOTHER (DEFENDANTS)*
Act No. XVI of 1908 (*Indian Registration Act*), section 50—*Registered and unregistered documents—Priority—Effect on rights of prior unregistered mortgagee of sale in execution of a decree on a subsequent registered mortgage.*

When property is sold in execution of a decree on a subsequent registered mortgage taking priority over a prior unregistered mortgage such sale does not have the effect of invalidating the prior mortgage or of extinguishing altogether

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* Second Appeal No. 627 of 1912 from a decree of H. W. Lyle, District Judge of Agra, dated the 22nd of February, 1912, reversing a decree of Mubarak Husain, Subordinate Judge of Agra, dated the 13th of July, 1911.

the rights of the mortgagee thereunder, but his debt would still be recoverable from the surplus, if any, left after the satisfaction of the registered mortgage.

THIS was a suit by the holder of an unregistered mortgage for Rs. 95 executed on the 15th of December, 1887, by Budh Singh in favour of the defendants' predecessor in title. There had been another registered mortgage over the same property executed on the 5th of December, 1892, in favour of Sah Tejpal, in pursuance of which the mortgagee had caused the mortgaged property to be sold and had purchased it himself. Tejpal resisted the suit on the ground of such purchase. The court of first instance gave the plaintiff a decree conditional on his paying to Tejpal half the amount due to him under the decree in his favour. On appeal, however, the District Judge dismissed the suit in its entirety, holding that the plaintiff's rights under his unregistered mortgage were altogether extinguished by the proceedings in respect of Tejpal's registered mortgage. The plaintiff appealed to the High Court.

Dr. *Satish Chandra Banerji* and *Munshi Benode Behari*, for the appellant.

The Hon'ble Dr. *Sundar Lal*, for the respondents.

GRIFFIN and CHAMIER, JJ.:—The plaintiff in the suit sued to recover principal and interest on an unregistered mortgage deed, dated the 15th of December, 1887, to secure an advance of Rs. 95. The mortgage was executed by Budh Singh, defendant No. 1. in favour of the plaintiff's predecessor in title. Defendant No. 2 Sah Tejpal held a registered mortgage, also for Rs. 95, executed on the 5th of December, 1892, hypothecating the same property. Tejpal brought a suit on his mortgage and obtained a decree, in execution of which he purchased the property himself. The present suit was resisted by Tejpal on the ground that he was purchaser in execution of a decree obtained on a document which by reason of registration took effect against the unregistered document held by the plaintiff. The court of first instance gave the plaintiff a decree conditional on his paying half the amount due to Tejpal defendant No. 2, under the mortgage deed in the latter's favour. Tejpal defendant No. 2 appealed to the lower appellate court. In his memorandum of appeal various grounds were taken. But the lower appellate court has decided the appeal on one ground only. Tejpal contended that as he was a purchaser at an auction sale held in execution of a decree on a

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Judicial Commissioner, and Mr. T. C. Piggott, 2nd Additional Judicial Commissioner) in favour of the present respondent (1) on the authority of a decision of a Full Bench in the case of *Chandradeo Singh v. Mata Prasad* (2).

On these appeals—

De Gruyther, K.C., and *B. Dubé* for the appellant contended that the alienations were binding on the plaintiffs. In the absence of any allegation that the debts, to satisfy which the alienations had been made, were incurred for immoral purposes, the alienations, as having been made by the heads of the joint families, were binding upon the other members of the families. The burden of proof that they were not binding was in any case on the plaintiffs, and they had failed to discharge it. The manager of a joint Hindu family had certain limited powers of alienation, and where the joint family consisted of a father and his sons, the father had all those powers, and he also possessed the power to alienate the joint ancestral property for his antecedent debts, and the sons were liable unless those debts were tainted with immorality. Reference was made to *Girdharee Lall v. Kantoo Lall* (3); *Suraj Bunsai Koer v. Sheo Proshad Singh* (4); *Nanomi Babuasin v. Modun Mohun* (5); *Bhagbut Pershad Singh v. Girja Koer* (6); *Mahabir Pershad v. Moheswar Nath Sahai* (7); and *Chandradeo Singh v. Mata Prasad* (2).

But it was contended that the respondent Mahabir Prasad was not entitled to carry on the suits, as he had, on the true construction of the agreements with the original plaintiffs, no title or interest to enable him to sue, especially after the withdrawal of the other plaintiffs as the result of compromising the suits. The suits were a mere gambling in litigation. The transferors were out of possession of the property, and the transferee acquired no title under the deeds. The case of *Achal Ram v. Kazim Husain Khan* (8) was referred to and distinguished.

(1) (1911) See *Mahabir Prasad v. Basant Singh*, 14 Oudh Cases, 299.

(2) (1909) I.L.R., 31 All., 176.

(5) (1885) I. L. R., 13 Calc., 21 (35);
L. R., 13 I. A., 1 (17).

(3) (1874) 14 B. L. R., 187 (196);
L. R., 1 I. A., 321 (330).

(6) (1888) I. L. R., 15 Calc., 717;
L. R., 15 I. A., 99.

(4) (1879) I. L. R., 5 Calc., 148;
L. R., 6 I. A., 88.

(7) (1889) I. L. R., 17 Calc., 584;
L. R., 17 I. A., 11.

(8) (1904) I. L. R., 27 All., 271; L. R., 32 I. A., 113.

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G. R. Lowndes for the respondent Mahabir Prasad contended that he had acquired a title under the agreements with the original plaintiffs which enabled him to maintain the suit. He was under these agreements a co-sharer with the original plaintiffs in the property. Both the Courts in India had decided that on the construction of the deed Mahabir Prasad had an existing right. In the present case, as in the case of *Achal Ram v. Kazim Husain Khan* (1), the agreements operated as a "present transfer" to the respondent Mahabir Prasad of the interest of the original plaintiffs. As to the alienations, it was contended that they were not within the competence of the alienors and were not binding on the original plaintiffs, nor on the respondent their transferee. They were not made for legal necessity nor required for the discharge of antecedent debts of the alienors. The decision of the majority of the Full Bench in the case of *Chandradeo Singh v. Muta Prasad* (2), on which the Judicial Commissioner's Court had relied, was correct.

Counsel for the appellant were not called upon to reply.

1913, March 14th :—The judgement of their Lordships was delivered by Lord ATKINSON :—

These are three consolidated appeals from three decrees of the Court of the Judicial Commissioner of Oudh, the first dated the 19th of March, 1909, and the other two the 29th of March, 1911.

By the first of these, certain decrees of the Subordinate Judge of Partabgarh, dated the 22nd of July, 1908, were in part affirmed and in part reversed, and by the two latter a judgement and decree of the District Judge of Rae Bareilly, dated the 5th of February, 1910, was also in part affirmed and in part reversed.

By this decree of the 5th of February, 1910, a previous decree of the same Subordinate Judge, dated the 3rd of August, 1909, was in part affirmed and in part reversed.

The facts out of which all this litigation has arisen are shortly as follows :—

A certain estate in five villages in the Partabgarh district was owned by two joint Hindu families, the respective heads of which were two brothers Binda Sewak and Ram Prasad, the share of the

(1) (1904) I. L. R., 27 All., 271 :

(2) (1909) I. L. R., 31 All., 176.

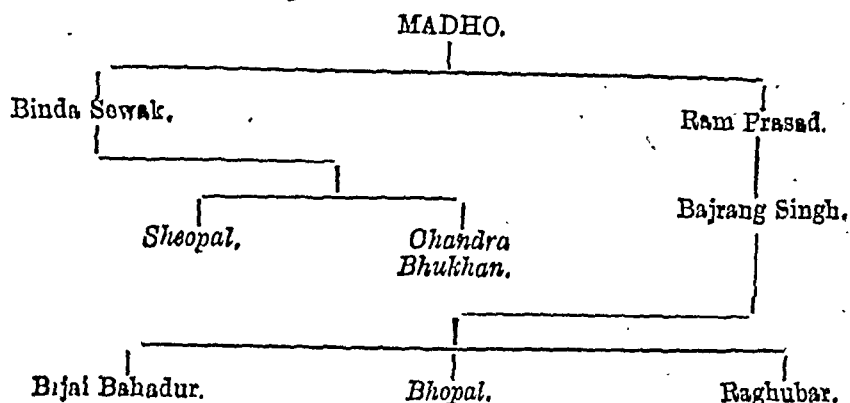
L. R., 32 I. A., 113.

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said Binda Sewak's branch being 7 annas 2 pies and that of Ram Prasad's branch 8 annas 10 pies.

A genealogical table set out in the respondent's case, the accuracy of which is not disputed, shows of what members these two families were composed:—



The persons whose names are printed in italics are plaintiffs in the two suits, numbered 548 and 549 of 1907, in which the decrees appealed from were respectively made, namely, Sheopal Singh and Chandra Bhukhan Singh in the first, and Bhopal Singh in the second. In each of these suits one Mahabir Prasad, not a member of either family, but claiming an interest in portions of the joint family property under certain agreements, was joined as a plaintiff.

By two deeds, dated respectively the 2nd of January, 1900, and 3rd of October, 1901, Binda Sewak purported to sell to Basant Singh (the appellant) his share of the joint family property.

Thereupon Ram Prasad, as co-sharer in the family estate, instituted two pre-emption suits in respect of these two sales, and obtained decrees therein. He subsequently, by deeds, dated the 4th of June, 1903, and 3rd of August, 1903, respectively, purported to sell and convey to the same Basant Singh (the appellant) the share of the property the right to which he had thus acquired by pre-emption, together with all but a 6 anna share of his own share of the family property. In addition he, by deed dated the 4th of February, 1907, mortgaged this latter 6 anna share to the same Basant Singh to secure a sum of Rs. 12,000. The mortgage was a possessory mortgage for a period of 25 years. Sheopal Singh, Chandra Bhukhan Singh and Bhopal Singh determined to impeach all these dealings with the joint family properties as

being, on several grounds, void according to Hindu law, but they had no money to meet the cost of litigation.

Two agreements, both dated the 25th of April, 1907, were accordingly entered into between them and Mahabir Prasad, the one by Sheopal Singh and Chandra Bhukhan Singh jointly and the other by Bhopal Singh. They are practically identical in terms. They provided that Mahabir Prasad should in each case finance the contemplated litigation on certain terms to be presently considered in detail.

Two actions were accordingly instituted in the court of the Subordinate Judge of Partabgarh, the first on the 10th of August, 1907, in which Sheopal Singh, Bhukhan Singh and Mahabir Prasad were plaintiffs, and Basant Singh, Binda Sewak Singh and Ram Prasad defendants, praying for "a decree for proprietary and actual possession of 4 annas 9 pies $6\frac{2}{3}$ karants under-proprietary share" in five villages therein named and for Rs. 1,704-14-9 $\frac{3}{4}$ mesne profits. In other words, it was an action of ejectment and for recovery of mesne rates.

In the second suit Bhopal Singh and Mahabir Prasad were plaintiffs, and Ram Prasad and his grandsons Bijai Bahadur Singh and Raghubar Singh defendants. The relief claimed was similar, namely, to recover possession of one-sixth of the property conveyed away by Ram Prasad by the three deeds already mentioned.

In both suits a plea was filed to the effect that Mahabir Prasad was not entitled to recover possession. That point was thus distinctly raised. Both suits were contested, and both heard together.

The principal defendant in the first suit, by deed, dated the 22nd of April, 1908, compromised with the two principal plaintiffs in that suit, namely, Sheopal Singh and Chandra Bhukhan. The deed provided, amongst other things, that the claim of these plaintiffs to recover the possession of the lands mentioned should be dismissed, and their claim for mesne profits rejected. This deed was filed in court, and on an application made under section 375 of the Code of Civil Procedure, the suit was dismissed as against these plaintiffs. A similar compromise was entered into in the second suit with Bhopal Singh, and that suit was similarly

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dismissed as against him. Mahabir Prasad thus became the sole plaintiff in both suits. His claim to recover the possession of the shares of the property mentioned in them respectively thus rests entirely upon the agreements he so entered into with these plaintiffs. Even if all the impeached deeds were absolutely void, he would not be entitled to the relief he claims unless these agreements conferred upon him a right to recover possession of the undivided shares of these villages of which he seeks to recover the possession. The agreements thus become the foundation of his title. Until their true construction and the nature of the rights they confer have been determined, it is irrelevant to consider the question of the validity or invalidity of the deeds. The other is the preliminary question, and it has not only been raised, but actually ruled upon by the Subordinate Judge in his judgement delivered upon the 22nd of July, 1908. In the last paragraph but one of this he, when dealing with the seventh issue, said:—“The suit, however, cannot fail altogether, as was contended by defendant 1. Plaintiff 3 has acquired an interest as to half the property.” This seventh issue ran thus:—“To what relief, if any, are the plaintiffs entitled?” Owing to the compromise, that issue came to mean, to what relief is the third plaintiff, Mahabir Prasad, entitled? And the last of the reasons stated in the appellant's case lodged in these appeals is that the respondent, Mahabir Prasad, is “not entitled to possession of the property in suit or to any other relief.” It may well be that this question, though raised, was not much discussed, or not at all discussed on the hearing of the appeals before the court of the Judicial Commissioner, but since the point arises on the very face of the documents on which the plaintiff's case is founded, their Lordships think they are bound to decide it. It would be quite impossible for them to advise His Majesty to grant to a litigant relief to which, they were of opinion he was not entitled, simply because those concerned for the parties in the cause abstained from discussing in the court from which the appeal to His Majesty had been taken a vital point plainly appearing on the very face of his written proofs, and plainly raised, as this point has been, in this case.

As the two agreements are practically identical in terms, it will be sufficient to consider one of them.

It is elementary law that a plaintiff in an action of ejectment must recover by the strength of his own title, not the weakness of his adversary's.

What may be the rights or interests, if any, which the plaintiff may have under these agreements in the subject-matter of the suit are irrelevant considerations if he has not a right to the possession he seeks to recover.

The primary question for decision, therefore, is, did the agreement in the first action confer upon Mahabir Prasad at the time that action was instituted a then present right to that possession? There is no suggestion that if he had not the right then he has since acquired it.

The provisions of the agreement setting forth the conditions upon which it was entered into, relevant on this point, run as follows :—

"1. That in the share of each declarant amounting to 2 annas 4 pies and 13½ karants Mahabir Prasad will be a co-sharer of one-half share, and the remaining one-half share will belong to us, the declarants, as follows :—

Sheopal Singh .. 2 annas 4 pies 13½rd karant share.

Chandra Bhukhan Singh .. 2 „ 4 „ 13½rd „ „

"2. We, the declarants, and Mahabir Prasad, will be bound by the following conditions :—

- (a) That Mahabir Prasad will bear the entire expenses in connection with the suit from the original Court to the Court of Appeal from his own pocket in the way he pleases, and if the opposite party prefer any appeal, then Mahabir Prasad will have to defend the appeal also with his own costs.
- (b) That in case of success Mahabir Prasad will be entitled to proprietary possession of the share entered in paragraph 1 of this document or one-half of the share which may be decreed, and it will be at the pleasure of Mahabir Prasad either to keep his share joint or to have it partitioned. But during the period of jointness he will have all rights of making collections and management of the *zamindari* share decreed.
- (c) That Mahabir Prasad will remain a co-sharer and proprietor like ourselves in all the *sir* and *khudkasht* lands and all zamindari rights relating to the zamindari share like ourselves, and we will have no right to keep separate possession over any *sir* and *khudkasht* land, nor will we raise any plea as to expropriary right."

In the view of their Lordships these provisions did not confer upon Mahabir Prasad a then present right to the possession of any share in the property the subject-matter of the suit. That right would arise, if at all, only when success in the contemplated

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litigation had been achieved. Success has not been achieved. By the agreement it was contracted that up to that time, at all events, he, Mahabir Prasad, should merely be a partner, or co-owner with his co-plaintiffs in a certain undivided fraction of the property mentioned in the first of its paragraphs. There was no present grant or assignment to him of any separate share or fraction of the property divided or undivided. At best the contract only amounted to this, that in a certain future event he should become entitled to the proprietary possession of a certain undivided fraction of it, and then have the right to have that fraction partitioned.

The case of *Lal Achal Ram v. Raja Kazim Husain Khan* (1) is wholly different from the present. There the sole owner of certain lands, who had already sold one-half of them, executed a deed of sale in which it was set forth that "he has sold half the estate to the Raja for a lakh and a half of rupees." He acknowledged the receipt of one lakh, the balance was to be paid on the termination of certain litigation, which the Raja was to conduct at his own expense. The statement of the amount of the consideration was no doubt exaggerated. But the vendor never impeached his deed as not being a valid transfer of the property. On the contrary, he had more than once affirmed it, urged the Raja to take proceedings founded upon it, and continued to receive payments due to himself under it. The terms of the instrument are not set out at length in the report of the case, but Lord Macnaghten in delivering the judgement of the Board, after dealing with all the facts and quoting from the deed the passage already mentioned, says, at page 121 of the report (2):—"Their Lordships agree with the judgement of the Court of the Judicial Commissioner that the transaction was a present transfer by Ardawan (the sole owner) of one moiety of his interest in the estate giving a good title to Raja on which it was competent for him to sue." The case cannot be relied upon as a guide to the true construction of the agreements in the present case.

On that construction their Lordships are clearly of opinion that neither agreement by its terms confers upon the respondent Mahabir Prasad any present right to recover the possession of

(1) (1905) I. L. R., 27 All., 271 :
L. R., 32 I. A., 113.

(2) I. L. R., 27 All., 290.

the share of the property mentioned in it which he claims to recover. They accordingly think that these appeals should be allowed, that the three judgements and decrees of the Court of the Judicial Commissioner, dated the 19th of March, 1909, and the 29th of March, 1911, respectively, should be set aside, that the two judgements and decrees of the lower Courts, namely, that dated the 3rd of August, 1909, of the Subordinate Judge, and that of the District Judge of Rae Bareilly, dated the 5th of February, 1910, should also be set aside, and that both the suits should be dismissed with costs, and they will humbly advise His Majesty accordingly. The respondent must pay the costs of these consolidated appeals.

Appeals allowed.

Solicitors for the appellants :—*Barrow, Rogers and Nevill.*

Solicitors for the respondents :—*Watkins and Hunter.*

J. V. W.

MOHAN LALJI AND ANOTHER (PLAINTIFFS) v. GORDHAN LALJI MAHARAJ
AND OTHERS (DEFENDANTS).

[On appeal from the High Court at Allahabad.]

Hindu Law—Endowment—Right of succession to sebaiship of temple belonging to Ballavacharya Gossains—Evidence of dedication—Claim of persons incompetent to be sebaits (as being Bhats) of Ballav temple disallowed as defeating the purpose for which the founder established the worship—Title—Proof of independent title to succession as sebaith.

In a suit for possession and the right of sebaiship of a temple belonging to the Ballavacharya Gossains founded by one Muttuji, the maternal grandfather of the plaintiffs (appellants) the defendant (respondent) contended that the ordinary Hindu law was not applicable as alleged by the plaintiffs, and that daughter's sons were excluded by custom from succession.

Held that, apart from positive testimony on the point, the performance of the worship of the idol in accordance with the rites of the sect for whose benefit it was held, might be treated as good evidence of dedication, and the ordinary rule of Hindu law relating to the descent of private property was not applicable.

Held also that the rule that the heirs of the founder succeed to the sebaiship laid down in *Gossamee Sree Greedharreejee v. Rumanlolljee Gossamee* (1) was, as there implied, subject to the condition that the devolution in the ordinary line of descent is not inconsistent with or opposed to the purpose the founder had in view in establishing the worship. In the present case the appellants being Bhats, and not belonging to the Gossain *kul* were not competent to be sebaits of a Ballav temple where the rites were performed according to the Ballav

* *Present* :—Lord ATKINSON, Lord MOULTON, Sir JOHN EDGAR and Mr. AMBER ALI.
(1) (1889) I. L. R., 17 Cal., 3 ; L. R., 16 I. A., 137.

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situation, which, it was clearly established, they could not perform. To allow their claim would defeat the purpose for which the worship was established.

Held further that the respondent had established an independent title of his own to the temple as being the nearest male relative of Muttuji both being descendants of two full brothers. The idol in the temple was brought from his temple at Nathdwara, and the worship founded by Muttuji was an off-shoot of the worship at Nathdwara. The temple was also built on land belonging to the Tekait respondent with the permission of his ancestor who held the office of Tekait at the time. He had therefore a clear title according to the customs and usages of the Ballav Kul to the sobaitship of the temple.

APPEAL from a judgement and decree (28th February, 1910) of the High Court at Allahabad, which affirmed a judgement and decree (5th August, 1907) of the Judge of the Small Cause Court at Agra, exercising the powers of a Subordinate Judge, dismissing the appellants' suit.

The facts of this case, which is an appeal from the decision of the High Court (RICHARDS and TUDBALL, JJ.) reported in Indian Law Reports, 32 Allahabad, 461, sufficiently appear from the judgement in that case, and are also stated in the judgement of their Lordships of the Judicial Committee.

On this appeal—

De Gruy'her, K. C., and *Ross, K. C.*, for the appellants contended that the burden lay on the respondents to prove the custom they alleged of the exclusion of the sons of daughters of the founder by his male kinsmen, and that they had failed to discharge it. The High Court had wrongly placed the burden of proof on the appellants to show that they, the daughters' sons, were entitled to succeed. The question was on whom the *onus* lay. Did it lie on the appellants who alleged that the ordinary Hindu law was applicable, or on the respondents who set up a special custom (contrary to the Hindu law) which, they contended, applied and governed the present case? Reference was made to *Jagadindra Nath Roy v. Hemanta Kumari Debi* (1); *Gossamee Sree Greedharreejee v. Kumanlolljee Goswamee* (2); *Greedharee Doss v. Nundokissore Doss* (3); *Muttu Ramalniga Setupati v. Perianayagam Pillai* (4); *Genda Puri v. Chatar Puri* (5) and *Janoki Debi v. Gopal Acharjia Goswami* (6). On the

(1) (1904) I. R. L., 32 Cal., 129;
L. R., 31 I. A., 203.

(2) (1889) I. R. L., 17 Cal., 8; L. R.,
16 I. A., 187.

(3) (1867) 11 Moo. I. A., 405 (427, 428).

(4) (1874) L. R., 1 I. A., 209 (228).

(5) (1886) I. L. R., 9 All., 1 (8); L. R.,
13 I. A., 100 (105).

(6) (1882) I. L. R., 9 Cal., 786 (771);
L. R., 10 I. A., 32 (37).

evidence it was submitted that it was proved that the daughters' sons do succeed to the office of sebaity of a temple of the kind in suit. The High Court had found that Muttuji was the founder of the worship conducted in the temple; and, on the above authorities the appellants as his heirs-at-law were entitled to hold the office of sebaity, and to obtain the custody of the idols, temple, and the properties appertaining thereto as superintendents and managers.

Sir *Erle Richards, K.C.*, and *B. Dube*, for the first respondent were not called upon.

1913, March 17th.—The judgement of their Lordships was delivered by Mr. AMBER ALI:—

The dispute in this case relates to the shebaitship of a Hindu temple belonging to the Ballavacharya Gossains situated at a place called Jatipura in the Muttra district of the United Provinces of India.

The Ballavacharya cult, in reality an offshoot of Vaishnavism, was founded in the 16th century of the Christian Era by one Ballavacharya, who is usually designated among his followers and disciples as Maha Pirbhuj. He and his descendants, who constitute the Ballavacharya Gossain Kul, are held in great veneration by the members of the sect and regarded as the incarnation of the famous and favourite Hindu deity Krishna, whom in common with other Vaishnavs (Vishnuvites) they worship. The cult established by Ballavacharya differed in several particulars from the practices in vogue among other votaries of Krishna, the principal point of difference consisting in the fact that he repudiated the practice of celibacy and asceticism practised by the other Gossains.

The Ballavacharya Gossains, in their turn, are represented of Ballav, possess several temples, some of which are presided over by a member of the Kul in being, and in others a Tikait.

The defendant Gossain Jagji is a member of the most important of these temples, the Ballavacharya Temple, which is situated at Nathdvara in the district of Muttra.

In order to make the case clear, it is necessary to state in this connection that the Ballavacharya Temple is situated at Nathdvara in the district of Muttra, and is one of the Ballavacharya Kul.

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In the first place the Ballavacharyas do not intermarry in their own *Kul*, as the members belong to the same *gotra*. They take wives from among the Bhats, a well-known Brahmanical caste, and marry their daughters to Bhats.

In the Ballavacharya Gossain temples, besides the principal image, which is directly or indirectly a presentment of Krishna, there are subsidiary images not enjoying the same worship and veneration but nevertheless regarded as representations of Krishna. They are almost invariably images of one or other of the descendants of Maha Pirbhuji.

Another fact necessary to bear in mind is that the ministrations in the Ballavacharya temples are entirely in the hands of the direct descendants of the founder, and the Gossains of his *Kul* are the preceptors of the cult taught by him.

The temple which forms the subject-matter of dispute in the present case is stated to have been built about the time of the Indian Mutiny, by one Muttuji, a descendent of Ballav and thus a member of his *Kul*. The worship he set up in this new temple was of the image of Sri Madan Mohanji, which is proved to have been brought from the Tikait defendant's temples at Nathdwara. This was one of the subsidiary images that were worshipped there along with the principal deity.

Muttuji remained in possession of the temple built by him and of the worship performed there until his death in 1883. He left a widow, Satbinda Bahuji, and two daughters, Musammat Ganga Beti and Gordhana Beti. After the death of Muttuji, his widow, Satbinda, carried on the worship until 1888 when she died, and the charge of the temple devolved on Ganga and Gordhana. Ganga died in 1896 and Gordhana in 1902. Both Ganga and Gordhana were married, according to the custom of the sect, to Bhat husbands and their sons are accordingly called Bhats. The plaintiffs, Mohan Lalji and Gordhan Lalji, are the sons of Ganga, whilst the defendant, Madhusudan Lala, is the surviving son of Gordhana, and Damodar Lala is her husband.

On the death of Gordhana, these two, together with Anrudh Lala, another of her sons, who was alive at the time, appear to have taken possession of the temple. In 1904 a suit was instituted by the defendant Tikait Gordhan Lalji, against Damodar and

his two sons to establish his title to the shebaitship, and for possession of the temple. This suit was referred to arbitration, and an award was made in his favour under which he obtained possession.

During the pendency of that suit, the plaintiffs, the sons of Ganga, brought the present action against Damodar and his two sons for joint possession of the temple and its appurtenances. On the 25th of August, 1905, Tikait Gordhan Lalji was added as a defendant to the suit of Mumsamat Ganga's sons.

The plaintiffs' claim against Gordhan Lalji is for ejectment; whilst against the other defendants it is for joint possession. They allege that Muttuji, their maternal grandfather, was the owner of the temple with all its appurtenances; that on his death his widow came into possession of the same by right of inheritance; and that upon her death their mother and their aunt "became the owners of the temple." And they claim to be entitled on the death of Gordhana to joint possession with her husband and sons to an equal share as "owners." It will be noted that they based their right on the ordinary right of inheritance under the Hindu Law.

The Tikait, the real contesting defendant, denied the title put forward by the plaintiffs. He urged that the temple was not the personal property of Muttuji and that the right of inheritance did not attach to it. He further alleged that, according to the custom in force among the Ballavacharyas, daughter's sons did not belong to their *Kul* and were debarred from taking part in the ministrations at the temple for the benefit of the worshippers; and he claimed that, as a collateral relative of Muttuji in the male line, he was entitled to succeed him as shebait.

He also alleged that the temple was built by Muttuji on land belonging to his (the defendant's) father with his permission, and that on Muttuji's death without leaving any lawful heir the right to the possession devolved on him by virtue of an agreement executed by Muttuji.

On these respective allegations of the parties the Trial Judge framed a number of issues, only four of which need attention. The second and third put in issue the incapacity alleged by the defendant of daughter's sons succeeding to their maternal grandfathers or taking part in the worship at a Ballav temple. The fourth

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raised the question whether the property was *debuttur*. The fifth dealt with the claim of the defendant to succeed to the shebaitship by right of heirship to Muttuji.

The Subordinate Judge, on an exhaustive review of the evidence, held on all the issues against the plaintiffs and accordingly dismissed the suit. His decision has been affirmed on appeal by the High Court of Allahabad.

From the decree of the High Court the plaintiffs have appealed to His Majesty in Council. They, or rather their advisers, abandoned, if not in the first court, certainly in the High Court, their contention that the temple in suit with the appurtenances formed the private property of Muttuji subject to the ordinary law of inheritance. In the High Court the case was discussed and decided on the admission of the plaintiffs' counsel that the property in suit was *debuttur*. In fact, in their Lordships' judgment, the evidence left no room for the opposite contention, for, apart from positive testimony directly bearing on the point, the performance of the worship in accordance with the rites of the sect for whose benefit it was held may be treated as good evidence of dedication. That being so, the ordinary rule of Hindu Law relating to the descent of private property is not applicable to the particular right in controversy in this case.

Stress, however, is laid on the principle enunciated in *Gossamee Sree Greedharreejee v. Rumanlolljee Gossamee* (1), where Lord Hobhouse, delivering the judgment of this Board, said as follows :—

“According to Hindu Law, when the worship of a thakoor has been founded, the shebaitship is held to be vested in the heirs of the founder, in default of evidence that he has disposed of it otherwise, or there has been some usage, course of dealing, or some circumstances to show a different mode of devolution.”

This rule must, from the very nature of the right, be subject to the condition that the devolution in the ordinary line of descent is not inconsistent with or opposed to the purpose the founder had in view in establishing the worship. This qualification is in fact covered by the words used by Lord Hobhouse.

Starting from this point, the first question to determine is whether the plaintiffs suing for the joint exercise of the right of

(1) (1889) I. L. R., 17 Cal., 3 : L. R., 16 I. A., 137.

shebaitship to the temple in suit, have established their competency for the office. The duties which are imposed on the person in charge of the temple and of its worship are to be found very comprehensively set forth in Professor Hayman Wilson's "Religious Sects of the Hindus." Both the courts in India have found that the plaintiffs, being Bhats, and not belonging to the Gossain *Kul*, cannot perform the diurnal rites for the deity worshipped by the sect; they cannot wash, dress or adorn the image or perform the *arti* (one of the most important rites) which seems to consist in waving the light before the image of the deity. They cannot touch the food offerings placed before the idols, which are afterwards distributed among the Vaishnav votaries. Nor can they communicate the *mantras* to the disciples for purposes of initiation. It is to be noted in this connection, that whilst the daughters of the Ballav Gossains married to Bhat husbands continue to live in their father's houses and remain within their father's *Kul*, their sons do not acquire that status; as sons of Bhats they are Bhats, and not Ballavacharya Gossains who are by virtue of their descent entitled to act as ministers of the cult established by Ballav Maha Pirbhuj.

Another fact is equally clear on the evidence that Bhat girls married into the Gossain *Kul* receive the *mantras* and become thenceforth members of the *Kul*. It is not surprising, therefore, that after Muttuji's death his widow and daughters remained in charge of the temple and its worship. But to allow the plaintiffs' claim to an admittedly Ballav temple, where the rites are performed according to Ballav ritual, which, it is clearly established, they cannot perform, would, in their Lordships' judgement, defeat the purpose for which the worship was established.

In an action of ejectment the conclusion at which their Lordships have arrived would be sufficient for the affirmance of the decree appealed against dismissing the plaintiffs' suit.

But their Lordships are of opinion that the Tikait defendant has succeeded in establishing an independent title of his own to the temple in suit. He appears to be the nearest male relative of Muttuji, both being descendants of two full brothers; there can be little doubt, also, that the image installed at Jatipura was brought from his temple at Nathdwara, and that the worship founded

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by Muttuji was an off-shoot of the worship in Nathdwara. The temple, again, was built on land belonging to the Tikait defendant, with the permission of his ancestor, who held the office of Tikait at the time.

It seems to their Lordships that, apart from the statements contained in Muttuji's letter, on which the defendant relied in his written statement, he has a clear title, according to the customs and usages of the Ballav *Kul*, to the shebaitship of the temple in suit.

On the whole their Lordships are of opinion that the judgment and decree of the High Court are right, and that this appeal must be dismissed. And they will humbly advise His Majesty accordingly.

The appellants will pay the costs.

Appeal dismissed.

Solicitors for the appellants:—*T. L. Wilson, & Co.*

Solicitor for the first respondent:—*Douglas Grant.*

J. V. W.

REVISIONAL CRIMINAL.

Before Mr. Justice Tudball.

EMPEROR v. TULSHI RAM.*

Act No. II of 1899 (Indian Stamp Act), sections 2 (23), 62 and 63—Sarkhat—Memorandum of account—Receipt—Several items of over Rs. 20 each—Each item to be stamped.

Held that a memorandum of account between debtor and creditor, which was left in the possession of the debtor and consisted of items entered from time to time of money advanced and repaid, was a document which required a separate receipt stamp in respect of each item of over Rs. 20.

ONE Tulshi Ram was in the habit of borrowing money from time to time from a money-lender. The account of the sums of money borrowed and repaid was left in the hands of the debtor, and consisted of a paper upon which such sums were entered as occasion arose in opposite columns. When the account was finally closed, a balance of Rs. 50 odd was paid and one receipt stamp attached and signed by the creditor firm. The receipt stamp was not cancelled. The debtor Tulshi Ram was on these facts convicted under section 62 of the Stamp Act, 1899, on the finding

* Criminal Revision No. 82 of 1913 from an order of Ram Saran Das, Magistrate, first class, of Ballia, dated the 23rd of October, 1912.

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that each entry of a receipt for over Rs. 20 required to be stamped separately. He was also convicted under section 63 of the Act. Tulshi Ram applied in revision to the High Court.

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Munshi *Lakshmi Narain*, for the applicant.

The Assistant Government Advocate (Mr. *R. Malcomson*) for the Crown.

TUDBALL, J.—In this case the applicant has been convicted under sections 62 and 63 of Act II of 1899 in respect of what has been called a *sarkhat* throughout the case. This *sarkhat* is a document on a piece of paper which appears to have been written up from time to time. It shows on one side sums of money advanced, and on the opposite side various sums of money repaid by the debtor. When the account was finally closed, a balance of Rs. 50 odd was paid and one receipt stamp attached and signed by the creditor firm. The receipt stamp was not cancelled. The Magistrate has held that the entry in respect of each of the items of receipt of over Rs. 20, is an acknowledgement within the definition of the word "receipt" in section 2, clause (23), of the Act, and that each of such entries should have been stamped, and he has, therefore, convicted the accused under section 62 of the Act. In respect of the non-cancellation of the receipt stamp affixed, he has convicted him under section 63. There cannot be any doubt that the *sarkhat* was written up from time to time and that it was left in the hands of the debtor, so that the entry of each item of payment and receipt might be entered thereon to act as an acknowledgement of payments and receipts. When each item of receipt was entered by the creditor therein, there can be no doubt that the memorandum imported an acknowledgement of a part-payment of the debt, and as each entry was made it ought to have been stamped with a receipt stamp. Technically, therefore, the applicant was guilty, and as only a nominal fine has been imposed, there is no reason for interference on the question of sentence. The conviction under section 63 is of course good. The application is rejected.

Application rejected.

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APPELLATE CIVIL.

Before Mr. Justice Sir Harry Griffin and Mr Justice Chamier.

BHAGWAN DAS AND ANOTHER (DEFENDANTS) v. MUHAMMAD

YAHIA (PLAINTIFF).*

Landholder and tenant—House in abadi—Well sunk by tenant inside his house—Mandatory injunction—Discretion of Court.

In this case the High Court refused to grant a mandatory injunction at the suit of the zamindar for the removal of a well recently constructed inside their house by tenants of a house in a town ; the position of the tenants being that they and their predecessors in title had paid no rent for generations, and were only liable to ejectment in the event of the site occupied by them being cleared of buildings.

IN this case the plaintiff was the zamindar of a patti in the town of Mariahu. The defendants were tenants of a house in the patti, but they had never paid rent, and were apparently only liable to ejectment in the possible event of the site occupied by them becoming denuded of buildings. The defendants started to build a well inside their house. The plaintiff thereupon instituted the present suit praying for an injunction restraining the defendants from building their well and directing them to restore the land to its original condition. The court of first instance held that the defendants were entitled to build the well and accordingly dismissed the suit. On appeal, however, the lower appellate court reversed this decision. The defendants appealed to the High Court.

Mr. S. A. Haidar (with him Dr. Satish Chandra Banerji), for the appellants :—

A tenant who occupies a house in the village *abadi* can make improvements in his house. He can do any reasonable thing which will add to the comforts and conveniences thereof ; *Balkishen v. Muhammad Ismail Khan* (1), *Bholai v. The Rajah of Bansi* (2). A well is a reasonable improvement ; it is a necessary adjunct or appurtenance to a house. The plot of land was given by the zamindar for the purpose of a house. The sinking of a well inside the house is not an act inconsistent with that purpose, and is not destructive of or permanently injurious to the land. The *wajib-ul-arz* gives to each tenant the unrestricted power to build or to

* Second Appeal No. 533 of 1912 from a decree of Prem Behari Lal, Subordinate Judge of Jaunpur, dated the 13th of February, 1912, reversing a decree of Gopal Das Mukerji, Munsif of Jaunpur, dated the 4th of September, 1911.

(1) Weekly Notes, 1893, p. 44.

(2) (1831) I. L. R., 4 All, 174.

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the suit, holding that the construction of the well inside the house was not such a user as affected the zamindar's rights injuriously, and that the well was a necessary adjunct to the comfort of the occupants of the house. The lower appellate court on appeal held that the plaintiff zamindar was entitled to the relief asked for on the ground that the construction of the well was an interference with the plaintiff's right as zamindar. The lower appellate court having decreed the suit the defendants come here in second appeal. The courts below find that the occupiers of houses in Mariahu have a right to transfer houses subject to payment of one-fourth of the sale price to the zamindar. We have heard the learned counsel for the parties at considerable length. The question, as it appears to me, for decision, in this appeal is whether the plaintiff has made out a case for issue of an injunction. The plaintiff is the zamindar of the patti where the defendants' house is situated. His rights as zamindar appear to be limited by the rights which occupants of houses have acquired by custom against the zamindar so long as the houses are in the occupation of the family. The houses only escheat to the zamindar in case of the family dying out. I am unable to hold that the construction of the well on the premises of the defendants is a breach of any obligation existing in favour of the plaintiff whether expressly or by implication. A well on the premises is an undoubted adjunct to the convenience of the occupants, and it is difficult to see in what way the zamindar's interests are injuriously affected by its construction; while its removal would undoubtedly cause inconvenience to the defendants. If there be an invasion of the zamindar's rights it is of so slight and doubtful a nature as not to call for interference, more particularly in view of the fact that the chance of the zamindar entering into possession of the house is very remote. There appears to be some reason for holding, as held by the court of first instance, that the plaintiff was actuated by malice in instituting the present suit. Taking all the circumstances into consideration I am of opinion that this is not a case in which the injunction asked for should be granted. I would therefore allow the appeal and dismiss the plaintiff's suit.

CHAMIER, J.—I agree that this appeal should be allowed. The appellants are the owners and occupiers of a shop and an adjoining

house in qasba Mariahu. The respondent is the zamindar of the qasba. The question for decision is whether the appellants are entitled to sink a well inside the shop without the permission of the respondent. It has been found by the courts below, and it is now admitted by the appellants, that the respondent is the exclusive owner of the land on which the house and shop stand, but that the appellants are entitled to retain possession as long as the buildings remain on the land. The Munsif held that the appellants were entitled to sink the well without the respondent's permission. On appeal the Subordinate Judge held that they were not.

It must be taken that the predecessors of the appellants obtained the land from the zamindar for the time being, for the purpose of erecting buildings thereon, and that they agreed expressly or impliedly not to use the land for any other purpose. Therefore, if the acts now complained of are inconsistent with the purpose for which the land was given to the appellants' predecessors, the respondent is entitled to a mandatory injunction. It was not suggested by counsel for the appellants that a mandatory injunction was not a suitable form of relief or that any other relief would meet the case. In this connection I may note that it was admitted before us that the respondent objected to the construction of the well as soon as he came to know of it.

Two provisions in the *wajib-ul-arz* have been referred to. One of them certainly has no bearing upon the case. It relates to the digging of wells by *kashtkars*, and evidently was not intended to apply to the *abadi*. The other says that a *kashtkar*, or *ryot*, can build and pull down as he pleases within his own inclosure (*andar ahate apne ke bana o bigur sakta hai*). I doubt whether this was intended to authorize the construction of wells. It was probably intended to authorize a *kashtkar* or *ryot*, to make structural alterations inside his premises without reference to the zamindar.

But I am not prepared to hold that the sinking of a well within the premises was an act necessarily inconsistent with the purpose for which the land was granted. A well is one of the amenities or conveniences of an Indian house, and I consider that the grant of land for building purposes carries with it the right of making a well for the convenience of the occupiers. I would therefore restore the decree of the Munsif.

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By THE COURT.—The appeal is allowed, the decree of the lower appellate Court is set aside and that of the court of first instance restored. The plaintiff will pay the costs of the defendants throughout.

Appeal allowed.

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 Appeal No. 39

Before Mr. Justice Sir Harry Griffin and Mr. Justice Chamer.

MUHAMMAD (Plaintiff) v. GHULAM HUSAIN and

ANWAR (Defendants) *

(Civil Procedure Code (1908), order XXI, rule 88—Execution of decrees—Sale in execution—Pre-emption—Title of pre-emptor defeasible.

Held that a title to a share in unlisted immovable property sold in execution of a decree which is still subsistent at the date of the sale in execution is not sufficient to justify a claim for pre-emption under order XXI, rule 88, of the Code of Civil Procedure, 1908. *Karni Prasad v. Mohan Bhagat* (1) and *Nalihan Bhai v. Khandekar Bai* (2) followed.

The facts of this case were briefly as follows:—A certain mahal was divided into two pattis, namely, (1) patti Fakir Bakhsh, in which the plaintiff was a co-sharer, and (2) patti Mumtaz-ud-din, in which the defendant was a co-sharer by virtue of shares purchased by him under two sale-deeds, dated the 11th of August, 1910. A share in the latter patti was put up, on the 20th of September, 1910, to sale by auction in execution of a decree. The plaintiff bid for the property, and the defendant, offering the same bid, claimed the right of pre-emption under order XXI, rule 88, of the Code of Civil Procedure. The sale was confirmed in the defendant's favour. Then the plaintiff brought a suit for a declaration that the defendant had no right of pre-emption, and for possession of the property. Both the lower courts dismissed the suit, hence this second appeal. Shortly before the institution of this suit, but subsequent to the date of the auction sale, the plaintiff had brought two suits for pre-emption in respect of the shares purchased by the defendant in patti Mumtaz-ud-din on the 11th of August, 1910: both these suits were decreed and the decrees had become final.

Dr. Satish Chandra Banerji (with him Pandit Braj Nath Vyas), for the appellant:—

* Second Appeal No. 39 of 1912 from a decree of Muhammad Shafi, Judge of the Court of Small Causes exercising of the powers of a Subordinate Judge of Allahabad, dated the 15th January, 1912, confirming a decree of Sumer Chand, First Additional Munsif of Allahabad, dated the 29th of August, 1911.

(1) (1909) I. L. R., 32 All., 45. (2) (1907) 4 A. L. J., 351.

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not a co-sharer therein. I am supported by section 182 of the Land Revenue Act and by the cases of *Digambur Messer v. Ram Lal Roy* (1) and *Ganga Singh v. Chedi Lal* (2).

Dr. Satish Chandra Banerji, replied.

GRIFFIN and CHAMBER, JJ.:—This was a suit by the appellant

for possession of a share in patti Mumtaz-ud-din in mahal Fakir Baksh, mauza Mani Umapur. This share was put up for sale on the 20th of September, 1910, in execution of a decree of a civil court. The plaintiff's bid was Rs. 530. The respondents offered the same amount and the share was knocked down to them under order XXI, rule 88, on their showing that they had purchased two other shares in the same patti on the 11th of August, 1910. The appellant was at the time the holder of a share in the other patti in the mahal, namely, patti Fakir Baksh, but held no share in patti Mumtaz-ud-din. His case is that he was at the time of the sale a co-sharer within the meaning of order XXI, rule 88, and that the respondents must be regarded as strangers, inasmuch as their title to the shares purchased by them on the 11th of August, 1910, was at the time defeasible and they have since been compelled to surrender those shares to the appellant under decrees for pre-emption obtained by him on the 8th of July, 1911, and the 31st of January, 1912.

It appears that mahal Fakir Baksh was recently the subject of an imperfect partition at which the two pattis were constituted. It appears also that the whole of the land comprising the original mahal lies either in one patti or the other, there being no *shamilat* patti. In these circumstances it is a nice question whether the 'undivided property' for the purposes of order XXI, rule 88, is the whole mahal or only the patti Mumtaz-ud-din. But we need not decide this question, for, in accordance with the decisions of KNOX, A. C. J., and TUDBAL, J., in *Kamta Prasad v. Mohan Bhagat* (3) and of STANLEY C. J., and BURKITT, J., in *Nabihah Bibi v. Kaulashwar Rai* (4) on appeal from the decision of RICHARDS, J., in 3 A. L. J., 426, we feel bound to hold that the defensible title to the shares in patti Mumtaz-ud-din acquired by

the respondents in August, 1910, did not give them the right to preempt the share now in question as co-sharers. We allow this appeal, set aside the decrees of the courts below, and decree the appellant's claim to possession of the share in question with costs in all three courts.

Appeal allowed.

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*Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq. BIRHAM KHUSHAL (DEFENDANT) v. SUMBHA (PLAINTIFF). * Act (Local) No. II of 1901 (Agra Tenancy Act), sections 79 and 95—Jurisdiction—Landholder and tenant—Occupancy holding—Suit for declaration that plaintiff is heir of deceased occupancy tenant and for possession of holding—Practice—Usual declaration refused.*

The son of a deceased occupancy tenant filed a suit against the zamindar in the civil court asking (1) to have it declared that he was the son and lawful heir of the late tenant and (2) for possession of the occupancy holding held by him. The plaintiff had been ejected more than two years before suit. Held, that although so far as the first relief claimed was concerned the suit might be cognizable by a civil court, so far as the second relief was concerned the plaintiff's remedy was by suit under section 79 of the Agra Tenancy Act, and, inasmuch as the time for filing such a suit had long since expired there was no object to be gained by granting the first relief. The entire suit was accordingly dismissed. *Dori Lal v. Sardar Singh* (1) referred to.

IN this case the plaintiff sued as the son and heir of a deceased occupancy tenant praying for a declaration of his status as such and for possession of the occupancy holding which had been of his father. He had previously made an unsuccessful application for mutation of names in respect of the holding and had also brought a suit under section 95 of the Agra Tenancy Act, 1901, which had been dismissed in appeal by the Commissioner two years before the filing of his present suit. The present suit was dismissed by the court of first instance upon the ground that it was not cognizable by a civil court. On appeal, however, this decision was set aside and the suit remanded. Against this order of remand the zamindar defendant appealed to the High Court.

Munshi Satya Narain, for the appellant.

Babu Lalit Mohan Banerji, for the respondent.

TUDBALL and MUHAMMAD RAFIQ, JJ.:—This appeal arises out of a suit, which was originally brought by the plaintiff Sumera in

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the Munsif's court, first, to have it declared that he was the son and lawful heir of one Jhan, deceased, and, as such, was entitled to the possession of a certain occupancy holding left by Jhan, and, secondly, for possession of the same as an occupancy tenant. The plaintiff claimed to be the legitimate son of Jhan and as such entitled to the holding. The zamindar resisted the claim. The plaintiff first of all applied to the revenue court for mutation of names in his favour. The zamindar objected, pleading that the plaintiff was not the legitimate son of Jhan. The application was disallowed. The plaintiff then brought a suit, under section 95 of the Tenancy Act, in the revenue court, asking for a declaration that he was the occupancy tenant of the holding. The suit was against the zamindar, who again raised the plea that the plaintiff was not the legitimate son of Jhan. The first court dismissed the suit and the court of the Commissioner upheld the decision on appeal in a very brief judgement, which runs as follows:—"The suit has been rightly dismissed. A suit under section 95 of the Tenancy Act is not the way in which to decide a question of legitimacy. The zamindar denies the existence of the tenancy and this is fatal to the suit. The appeal is dismissed with costs." This decision was passed on the 15th of November, 1909, apparently some two years or more after the death of Jhan. It is also clear that the Commissioner dismissed the suit on the ground that the tenancy was no longer in existence. Two years and six days after this decision the plaintiff comes to the civil court with this suit, in which he claims possession of the occupancy holding as against the landlord. The first court dismissed the suit on the ground that it was not cognizable by the civil court. This decision has been set aside in appeal and the suit remanded to the court of first instance by the Additional District Judge of Bareilly.

The defendant comes here on appeal, and urges that the suit is not cognizable by the Civil Court. The suit is very similar in its aspects to that of *Dori Lal v. Sardar Singh* (1), the only difference being that in that suit only a declaration was asked for that the plaintiff was the adopted son. It seems to us quite clear that on the death of Jhan, assuming that the plaintiff was

his legitimate son, he was entitled to the tenure and to continue him from going on to the holding, the plaintiff as occupancy tenant thereof was illegally dispossessed, and it was open to him to bring a suit under section 79 of the Tenancy Act for possession. In that suit it would have been open to the landlord to plead that he was not the occupancy tenant, and that he was not the legitimate son, and the matter could have been fought out in that suit. Section 95 of the Tenancy Act is hardly the section under which to proceed, and the suit brought under that section was rightly dismissed, as the plaintiff was not in possession. Even in the present suit it had to be admitted on behalf of the plaintiff that his suit for possession could not lie in the civil court, and it is said that all that he requires and asks for is a declaration that he is the legitimate son of Jhan. We are not prepared to say that if the plaintiff had come to the civil court for a simple declaration that he was the legitimate son of Jhan, he would not have been entitled to the declaration, provided that he proved his case; but the suit is actually one for possession of an occupancy tenure and is brought against the landlord. For two years after the dismissal of his suit by the Commissioner he did nothing. A suit for possession by a tenant illegally dispossessed has to be brought within six months of the dispossession. Such a suit, if it be now brought by the plaintiff, could not succeed. Therefore to grant a declaration that he is the legitimate son of Jhan would be of no use to him now. It could not be followed up by a suit for possession in the revenue court. In these circumstances, in our opinion, the suit must fail. In so far as it is a suit for possession of the holding, it is not cognizable by the civil court, and in so far as it is a suit for a declaration that he is the legitimate son of Jhan, and as such entitled to the occupancy holding, the Court cannot grant such a declaration as it would be of absolutely no value to the plaintiff. He has misconceived his remedy. He ought, in the first instance, to have sued for possession in the revenue court. We allow the appeal, and, setting aside the decision of the lower appellate court, restore the decree of the court of first instance with costs in all courts.

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Before Mr. Justice Sir George Knox and Mr. Justice Muhammad Rafiq.
JALSHAR RAI AND OTHERS (DEBENDARYS) v. ANRUP RAI AND OTHERS
(PLAINTIFFS).*

Hindu law—Mitakshara—Joint Hindu family—Liability of sons in respect of a mortgage executed by father—Exemption of sons' interests—Subsequent suit against the sons—What plaintiffs are entitled to recover.

In 1892 a decree was passed on appeal for sale on a mortgage of joint family property against the father of the family. In 1896 the sons, who were not made parties to the original suit, obtained a decree exempting their shares in the family property. In 1897 the share of the father was sold and realized less than half the amount of the decree. In 1910 the mortgages brought a suit against the sons to recover the balance of the mortgage debt after giving credit for the amount realized by sale in execution of the decree of 1892.

Held the suit was not barred, but that the plaintiffs could only recover the unsatisfied portion of the decree of 1892 together with future interest as allowed by that decree. They could not treat the suit as an ordinary mortgage suit, merely giving credit for the amount realized under the decree of 1892, nor could they claim interest at the contractual rate on the unpaid amount of the decree.

Lachhman Das v. Dulla (1) followed. *Dharam Singh v. Angan Lal* (2) and *Ran Singh v. Sobha Ram* (3) referred to.

The facts of this case are fully stated in the judgment of the Court.

The Hon'ble Munshi Gokul Pyasad, for the appellants.
Maulvi Muhammad Isly, for the respondents.

KNOX and MURHAMAD RAUF, JJ:—It appears that one Payag Rai, father of the first five defendants appellants and grandfather of the other six, executed a deed of mortgage on the 27th of September, 1883, in favour of Anrut Rai plaintiff respondent No. 1, and the ancestors of the other plaintiffs respondents. The mortgage was given in respect of ancestral property in lieu of Rs. 999, carrying fourteen annas per cent. per mensem interest, and was redeemable on the 27th of June, 1885. In 1891 the mortgagees instituted a suit against Payag Rai only without impleading his sons, to recover, Rs. 1,567-7-4½, the amount due on foot of the mortgage of 1883 and for sale of the mortgaged property in default of payment. One of the objections to the suit was that

* Second Appeal No. 1114 of 1911 from a decree of Ram Anatar Pande, District Judge of Azamgarh, dated the 27th of May, 1911, modifying a decree of Ram Chandra Chaudhuri, Subordinate Judge of Azamgarh, dated the 16th of

December, 1910.

(1) Weekly Notes, 1900, p. 125. (2) (1899) I. L. R., 21 All., 301.
(3) (1907) I. L. R., 29 All., 544.

postditem interest at the stipulated rate of fourteen annas per cent. per mensem could not be claimed under the terms of the deed of the 27th of September, 1883. The court of first instance allowed the objection and passed a decree on the 3rd of July, 1891, against Payag Rai for Rs. 1,548-11-6. On appeal the learned District Judge gave effect to the objection of Payag Rai as to interest, holding that the mortgagees were entitled to recover post ditem interest by way of damages only, which he allowed at six per cent. per annum. The decree of the first court was modified and the claim of the mortgagees was decreed for Rs. 1,321-7-6 on the 11th of June, 1892.

On the 18th of August, 1896, the first five defendants appellants, the sons of Payag Rai, instituted a suit against the mortgagees for a declaration that the decree obtained by the latter against Payag Rai was not binding on them, as they were not parties to it, and that their share in the mortgaged property was not liable to sale under it. The claim of Payag Rai's sons was decreed on the 11th of November, 1896. On the 20th of February, 1897, the share of Payag Rai only in the mortgaged property was sold in execution of the decree of the 11th of June, 1892. The sale realized Rs. 725.

On the 13th of February, 1910, eighteen years after the decree obtained against Payag Rai and thirteen years after the sale of his share, the plaintiffs respondents brought the suit out of which this appeal has arisen in the court of the Subordinate Judge of Azamgarh against the sons and grandsons of Payag Rai to recover Rs. 2,093-2-6, the balance alleged to be due on the mortgage of 1883. The suit of the plaintiffs respondents was in form an ordinary mortgage suit and they claimed Rs. 2,093-2-6 by making up the accounts from the date of the original mortgage as in an ordinary suit on a mortgage bond, setting the amount realized by Payag Rai's share. In making 22 annas interest was charged at the stipulated rate of fourteen annas per cent. per mensem from the date of the mortgage to the date of the institution of the suit, there being no clause in 1883, under which interest after due date was to be charged at a lower rate only. The court of first instance allowed the objection and passed a decree on the 3rd of July, 1891, against Payag Rai for Rs. 1,548-11-6. On appeal the learned District Judge gave effect to the objection of Payag Rai as to interest, holding that the mortgagees were entitled to recover post ditem interest by way of damages only, which he allowed at six per cent. per annum. The decree of the first court was modified and the claim of the mortgagees was decreed for Rs. 1,321-7-6 on the 11th of June, 1892.

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appeal before us. It was urged in defence that as the decree of 1892 against Payag Rai had become barred and incapable of execution on the date of the institution of the present suit, the claim of the plaintiffs respondents was also barred. The principle on which accounts were made up in the plaint was also objected to. The Subordinate Judge disallowed the pleas in defence and decreed the claim for Rs. 2,093-2-6. On appeal the learned District Judge modified the decree of the first court. He held that the plaintiffs respondents should get the unsatisfied amount of the decree of 1892 together with interest at the contractual rate of fourteen annas per cent. per mensem from the 20th of February, 1897, up to date of decree.

The defendants appellants challenge the decree of the lower appellate court on the two grounds already mentioned. They contend that the original mortgage debt contracted by Payag Rai was merged in the decree of 1892. The mortgage of 1883 no more exists. The only outstanding debt against the ancestor of the appellants, for the payment of which they are liable under the Hindu law, is the unsatisfied amount of the decree. And as the decree has become barred and incapable of execution, the debt for the recovery of which the present suit is brought has also become barred and no claim in respect of it can be maintained.

The learned vakil for the appellants relies in support of his argument on the case of *Lachman Das v. Dalu* (1). That case, in almost every respect, resembles the present case. In that case one Data Ram, father of a Mitakshara joint family, executed a mortgage in respect of ancestral property. The mortgagee sued Data Ram alone and obtained a decree against him. In execution of the decree the mortgaged property was sold for the amount of the decree and purchased by the mortgagee. Subsequently the sons of Data Ram sued the mortgagee and obtained a decree for recovery of possession of their share in the mortgaged property on the ground that they were not parties to the suit in which the decree for sale had been passed against their father. Then the mortgagee brought a suit against the sons, framing his suit as an ordinary mortgage suit and making up accounts from the date of the mortgage and giving credit for the money realized at the sale.

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They denied their liability for the
er of their father to charge their
erty. They further disputed the
had been made up in the plaint.
made liable for the mortgage-debt,
n of the money paid at the sale of
ir share which was released from
against their father was one-fourth
objection HENDERSON, J., remarked

in to the finding that previous to the suit by
mortgage decree had been fully satisfied, and
the mortgage) has since been deprived of a
property which he himself purchased for
ly that any portion of the debt has not been
original mortgage no longer exists, and if there
e debt due upon the decree against Data Ram,
ata Ram, are liable to that extent for the debt
allege that the debt was one from which
It would not be unfair to
which was paid for the whole property and
mount for which credit should have been given,
as a debt for which the respondents are still
of Rs. 275 became an outstanding debt as
s' decree declaring them entitled to possession
will carry such interest, if any, as was allowed
mortgage decree. For this amount the respon-

the plaintiff."

these observations that the learned vakil
is that the mortgage of 1883 merged in
the mortgage of 1883 no more exists and
Payag Rai has become barred, the claim
is also barred. We do not think, that
llants is sound. The plaintiffs respondents
on the basis of the decree of 1892. They
e appellants' share in the ancestral pro-
hat decree. And indeed they could not
ree of 1896 in favour of the appellants
were not bound and that their interest
was not affected by the decree obtained
according to the appellants, the mortgage

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of 1883 has merged in the decree of 1892, then the unsatisfied portion of that decree can be recovered only as a simple money debt. If the contention of the appellants is correct, the present suit is not maintainable, that is, the plaintiffs respondents cannot enforce payment of the debt charged on the ancestral property by Payag Rai against the interests of his sons in that property, though the debt was not tainted with immorality or otherwise objectionable.

The plea of limitation urged on behalf of the appellants can only be given effect to if we hold that the suit of the plaintiffs respondents in its present form is not maintainable. That such a suit is maintainable is amply borne out by the case-law on the subject, vide *Dharam Singh v. Angan Lal* (1) and *Ran Singh v. Sobha Ram* (2). We, therefore, find that the claim of the plaintiffs respondents is not barred by limitation. The observations of HENDERSON, J. quoted above, upon which great stress is laid by the learned vakil for the appellants, do not apply to the nature of the remedy open to a mortgagee against the Hindu sons, but to the amount recoverable by him after he has obtained a decree against the father only and a portion of that decree remains unpaid. Those observations do, however, certainly support the second contention for the appellants, namely, that the plaintiffs respondents cannot recover more than the unsatisfied portion of the decree of 1892 with future interest allowed on that decree. The plaintiffs respondents cannot make up accounts as in an ordinary mortgage suit, and, giving credit for the money realized at the sale of Payag Rai's share, claim the balance. Nor can they claim to recover interest at the contractual rate on the unpaid amount of the decree, as has been allowed to them by the learned District Judge. We allow the second contention of the appellants. The result is that we modify the decree of the lower appellate court by decreeing the claim of the plaintiffs respondents for Rs. 529-3-0 with interest at six per cent. per annum from the 20th of February, 1897, up to the date of the decree of this Court, that is, Rs. 1,038-5-0. The appellants will pay the sum of the Rs. 1,038-5-0 within six months of the decree of this Court with future interest at six per cent. per annum. In default of payment within six

(1) (1899) I. L. R., 21 All., 201.

(2) (1907) I. L. R., 20 All., 211.

months the amount will be realized by sale of the share of the appellants in the property specified in the mortgage of 1883. Future interest at six per cent. per annum is allowed. Costs in all courts in proportion to success and failure.

Decree modified.

Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.
JAMNA PRASAD RAUT (JUDGMENT-DEBTOR) v. RAGHUNATH PRASAD

AND OTHERS (DEBTEE-HOLDERS).*

Civil Procedure Code (1908), section 60 (c)—Execution of decree—Attachment—Objection that attached property is the house of an agriculturist—Judgment-debtor both zamindar and agriculturist—Burden of proof.

Where a judgment-debtor whose house was attached in execution of a decree took objection that the house was the house of an agriculturist to which section 60 (c) of the Code of Civil Procedure applied and was not susceptible of attachment, and it was found that the judgment-debtor was both an agriculturist and a zamindar :

Held that it lay on the judgment-debtor to prove that the house was strictly of the nature contemplated by the provisions of section 60 (c).

In this case in execution of a simple money decree against one Jamna Prasad Raut a house belonging to him in a certain village was attached. The judgment-debtor took objection that the house was the house of an agriculturist within the meaning of section 60 (c) of the Code of Civil Procedure and could not be attached. This objection was overruled on the finding that the house was not in fact occupied by the judgment-debtor (who was both a zamindar and an agriculturist) as an agriculturist. The judgment-debtor appealed to the High Court.

The Hon'ble Dr. Tej Bahadur Sapru and Munshi Haribans Sahai, for the appellant.

Munshi Mangal Prasad Bhargava (with him Babu Jogindro Nath Chaudhry), for the respondent.

TUDBALL and MUHAMMAD RAFIQ JJ :—The appellant is a judgment-debtor whose house in a certain village has been attached in the execution of a simple money decree. Two portions of the same house have already been attached and sold, and the remainder, which is described as a six anna share, has now been attached. The judgment-debtor came forward and objected that he was an agriculturist and therefore his house was exempt from attachment

* First Appeal No. 304 of 1912, from a decree of Harbandhan Lal, First Additional Subordinate Judge of Gorakhpur, dated the 1st of June, 1912.

and sale. The court below has decided that the house is not occupied by him as an agriculturist and is therefore not exempt from sale. He has come here on appeal. The question is whether or not he has produced evidence to show that he is an agriculturist and occupied the house as such. The appellant was formerly the zamindar of the village, but his interest as such has been sold and he now holds his *stir* land as an proprietary holding. He lives in another village and holds zamindari in several villages. He has produced two witnesses who state that his cattle and implements are kept in the house in dispute. The appellant being both a zamindar and a cultivator of land, the question arises as to what is his main source of income and whether or not he is an agriculturist within the strict sense of the term and occupies the house as such. The burden of proof lay on him, and it was for him to show to the court that his main source of income was cultivation and not zamindari and that he was in the strict sense of the term an agriculturist. He produced two witnesses, and in our opinion their evidence is not sufficient to prove that his main source of income is agriculture and that he is an agriculturist within the strict sense of the term. As a matter of fact in the past he held considerable zamindari, though he has lost some of it by reason of decrees obtained against him. In this case it has not been satisfactorily proved that he is an agriculturist within the strict meaning of the term. The appeal fails and is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Sir Harry Griffin and Mr. Justice Channier.

RAGHUNANDAN PRASAD (PLAINTIFF) v. SHEO PRASAD (DEFENDANT).

Act No. XV of 1888 (North-Western Provinces and Oudh Municipalities Act), section 10—Act (Local) No. I of 1903 (United Provinces Municipalities Act), section 187—Municipal Board—Election—Suit to set aside election—Jurisdiction of Civil Court—Limitation—Act IV, IX of 1908 (Indian Limitation Act), schedule 1, article 120.

Held that an order of the Government directing that a particular municipal election held in the year 1911 should be conducted according to certain rules passed in 1884, and not according to the rules passed in part *mutatis* in 1910, which superseded those of 1884, was *ultra vires*, and that, inasmuch as the

* Second Appeal No. 1012 of 1912 from a decree of H. M. Wright, District Judge of Bareilly, dated the 13th of June, 1912, confirming a decree of Magistrate Das, Officiating Subordinate Judge of Bareilly, dated the 12th of July, 1911.

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1884 did not apply and the election was not held under the rules of

it would lie in a civil court to contest the election, irrespective of any-
 tained in either set of rules, the period of limitation applicable to
 as that prescribed by article 120 of the first schedule to the Indian
 on Act, 1908. *Gur Charan Das v. Har Sarup* (1) referred to.

In this case the appellant and the respondent were rival can-
 didates for a seat on the municipal board of Bareilly at an election
 held on the 18th of March, 1911. The respondent having been
 duly elected, the appellant, on the 24th of March, pre-
 sented a petition to the District Magistrate. On the 10th of
 April the petition was rejected, and on the following day the
 appellant filed his present suit in the court of the Subordinate
 Judge of Bareilly claiming a declaration that he had been elected
 by a majority of the lawful votes given, and in the alternative
 that the election was void as having been held under
 which had been already cancelled. The suit was dismissed
 appeal by the District Judge of Bareilly, on the ground that
 the election had been held under certain rules framed by Govern-
 ment in 1884, one of which barred the jurisdiction of the civil
 court and that the appellant was not empowered to maintain the
 suit under the rules for municipal elections framed in
 1884 under the Specific Relief Act. The plaintiff appealed to
 the High Court.

Satish Chandra Banerji, for the appellant.

Hon'ble Pandit Moti Lal Nehru, for the respondent.

THE APPELLANT AND THE RESPONDENT
 rival candidates for a seat on the municipal board of Bareilly
 election held on the 18th of March, 1911. The respondent
 had been declared to have been duly elected, the appellant on the
 10th of March, contested the validity of the election by a petition
 presented to the District Magistrate. On the 10th of May that
 petition was rejected, and on the following day the appellant brought
 his suit in the court of the Subordinate Judge of Bareilly claiming
 a declaration that he had been elected by a majority of the lawful
 votes given, and in the alternative, a declaration that the election
 was void as having been held under rules which had been cancelled.
 The court held that the suit was cognizable by a civil
 court but the suit has been dismissed by an appellate order of the
 High Court. (1) (1912) I.L.R. 34 All. 391.

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District Judge on the ground that the election was held under rules made in 1884, one of which barred jurisdiction of the civil court, and the appellant was not entitled to maintain this suit under some new rules made in July, 1910, or under section 9 of the Specific Relief Act. The suit is obviously one of a civil nature, and it is unnecessary to cite authority for the proposition that it is maintainable in a civil court, unless it is barred by some Act of the Legislature or by some rule having the force of law.

Rules regarding elections of this kind in Bareilly were made in 1884 under section 10 of Act XV of 1883. Rule No. 45 provided that the validity of an election might be questioned by petition to the District Magistrate presented within fifteen days of the election. Those rules were superseded by rules made in July, 1910, under section 187 of the Municipalities Act, 1900, one of which expressly recognized the right of recourse to a 'competent court' to challenge the election. This Court has held [see *Gur Chaman Das v. Har Srup (1)*] that the competent court is the civil court. It is quite clear that the election now in question ought to have been held under the rules of July, 1910. The Local Government seems to have directed that this election should be held under the rules of 1884. That order does not appear to be a rule made under the Act, but appears to be merely an executive instruction to the Magistrate. The only rules of which we can take notice are the rules made under the Act. We must, therefore, hold that the election was contrary to law.

We have grave doubts whether the Government was competent to bar the jurisdiction of the civil court by means of a rule made under section 10 of the Act of 1883. The respondent relies upon clause (g) of section 9 read with section 10 of the Act, but that clause refers only to 'the system of representation and of election'. It is, however, unnecessary to decide this question, for the rules made under the Act of 1883 had ceased to have any effect before the election now in question was held. It is admitted that the election was not held under the rules of July, 1910, and cannot be justified by those rules. For the above reasons we hold that at the date of the election there was no provision having the force of law which barred the maintenance of

the present suit. The suit was, therefore, maintainable. On the merits the appellant is entitled to a declaration that the election of the respondent was void having been held contrary to law.

The only other question is whether the suit was brought within time. The period of limitation prescribed by the rules of 1884 may be disregarded, both because it applies only to a petition to be presented to the District Magistrate and because those rules had ceased to have any effect when the election was held. If the rules of 1884 are disregarded, the limitation applicable to the present suit is that prescribed by article 120 of schedule 1 to the Limitation Act, 1908, and the suit was brought within time. We express no opinion upon the question of the validity of the rule made under section 187 of the Municipalities Act, 1900, which prescribes a period of limitation for a suit to contest an election held under the rules of July, 1910.

We allow this appeal, set aside the decree of the court below, and give the appellant a declaration that the election of the respondent was invalid. The respondent must pay the appellant's costs in all three courts.

Appeal allowed.

FULL BENCH.

*Before Mr. Justice Sir George Knox, Mr. Justice Tudball and Mr. Justice Channier. DURGAKUNWAR (PLAINTIFF) v. MATU MAL AND OTHERS (DEFENDANTS) **

Hindu law—Hindu widow—Powers of alienation possessed by a Hindu widow in respect of property of her husband—Transfer of debt secured by a mortgage.

A Hindu widow in possession as such of property which had been the property of her husband in his life-time can always alienate her life interest in such property and a transfer by her of the corpus of the property without legal necessity and not for a pious purpose is not void but only voidable at the instance of the reversioners.

A Hindu widow, without legal necessity transferred a mortgage debt and the security therefor, which had been the property of her late husband, to D, who thereafter sued to recover the debt by sale of the mortgaged property. Held that the transferee acquired all the rights which the widow had and could exercise during her life-time in respect of the mortgage, one of these being to recover the debt. *Bijoy Gopal Mukherji v. Krishna Mahishi Debi* (1) referred to.

This was a suit for sale on a mortgage, dated the 12th of June, 1879, made by Tara Singh and Bahadur Singh in favour of

*Appeal No. 140 of 1911 under section 10 of the Letters Patent.
(1) (1907) I.L.R., 34 Cal., 329.

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one Murlī Dhar. The mortgagee died shortly after, leaving a son, Musammāt Ganga Kunwar, his widow, surviving him. The two widows transferred the mortgage right under the mortgage of the 12th of June, 1879, to Musammāt Durga Kunwar, the plaintiff appellant in the present case. The plaintiff brought this suit for sale on foot of that mortgage. The defendants 1—6 were prior mortgagees of the same property under a mortgage of 1872, and they had purchased the property in 1890 in execution of a decree on their mortgage, to which decree neither the plaintiff nor her transferors or their predecessors in interest were parties. The defendants, 2nd party, were the mortgagees and their representatives, and the defendants, 3rd party, were the two ladies Ganga Kunwar and Parbatī, the transferors. The plaintiff offered to redeem the prior mortgages, but in the alternative prayed that the property might be sold subject to those mortgages. The defendants, 3rd party, admitted the claim of the plaintiff, and defendants, 2nd party, did not appear. The defendants, 1st party, contested the claim on these grounds:—(1) The transferors being widows of members of a joint Hindu family, including others than their husbands, could not transfer the debt and the plaintiff did not get the widow's estate in the mortgage. (2) The sale to the plaintiff was without legal necessity and therefore void, and as a corollary from this, (3) that it was for the purpose of defeating the rights of the reversioners. The widows of Murlī Dhar and Rup Ram were alive at the date of suit. The reversioners were no parties to the suit, but another suit was brought by them alleging themselves to be bandhus of Rup Ram and asking for a declaration that the transfer by Ganga Kunwar to plaintiff was void against them. The plaintiff defended that suit on the ground that the widows were competent to transfer. The Subordinate Judge found that the family was not joint, and that Ganga Kunwar had a widow's estate in the property left by her husband, including the mortgage, but that there was no legal necessity for the transfer. He dismissed the suit of the plaintiff, Durga Kunwar, and decreed that of the reversioners against her on these findings and gave them a decree that the plaintiff had acquired no rights—whatever—against them.

On appeal to the High Court the case came up before RICHARDS,

C. J., and BAXTER, J., who delivered the following judgments :—

RICHARDS, C. J.—This suit was brought to recover a sum of Rs. 70,000, principal and interest due under a mortgage, dated the 12th of June, 1879. The mortgage was made in favour of Murli Dhar by Tara Singh and Bahadur Singh. The principal was Rs. 4,000. The rate of interest was Rs. 1-2-0 per mensem, compound interest. The bond in suit is alleged to have been sold to the plaintiff on the 21st of May, 1909, in consideration of the sum of Rs. 7,500 by Musammam Parbati and Musammam Ganga Kunwar. Musammam Parbati was the wife of Murli Dhar, and Musammam Ganga Kunwar was the wife of Rup Ram, the son of Murli Dhar. Both the father and the son were dead prior to the execution of the sale-deed. It appears from the plaint itself that the property which it is now sought to bring to sale had already been sold under a mortgage decree on foot of a prior mortgage dated the 19th of February, 1872. The decree had been obtained as far back as the year 1890. The decree-holders had purchased the property themselves, and they have been in actual possession since some time between the years 1892 and 1895. The respondents are the representatives of these prior mortgagees. The plaintiff claims that when the suit was brought on foot of the prior mortgage neither Murli Dhar nor Rup Ram were made defendants, and that accordingly she, as assignee of the bond of the 12th of June, 1879, is now entitled to bring the property to sale on terms of paying to the respondents the amount, if any, due upon the mortgage of the 19th of February, 1872. She claims that over a lakh is due on foot of the mortgage of the 12th of June, 1879, but she relinquishes the sum of Rs. 76,938-14-0 and sues to realize the balance, that is to say, the sum of Rs. 70,000.

The suit out of which the connected First Appeal No. 174 of 1910 arises was tried in the lower court at one and the same time. It was a suit in which the plaintiffs in the suit claimed to recover a declaration that the sale deed of the 21st of May, 1909, was void as against them. A number of issues were tried in this last mentioned suit. The learned Subordinate Judge held that the bond in suit became vested in Rup Ram after the death of Murli Dhar, and that the plaintiffs Sri Gopal, Moti Lal and Perti

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I will now consider the reversionsers. He found further that the sale of the 21st of May, 1909, was made without legal necessity and with a view to deprive the reversionsers of their right. The court accordingly gave a decree in favour of the plaintiffs 2 to 4 declaring that the sale was void and ineffectual against them.

The learned Subordinate Judge also dismissed the plaintiffs' claim in the present suit holding that, inasmuch as the bond was sold without legal necessity and for the purpose of defeating the rights of the reversionsers, the plaintiff did not acquire by virtue of the sale any title to maintain the suit.

The plaintiff, Musammatt Durga Kunwar, has appealed against the decree dismissing her suit and also against the decree in the connected appeal declaring that the sale was void against the reversionsers.

It is difficult to understand why the owners of the bond in suit slept on their rights so long. There can, I think, be no doubt whatever that the purchase of the bond by the plaintiff was a speculative purchase. It is impossible to know exactly how much of the consideration for the sale actually passed, or what was the arrangement between the vendors and the vendee. I think, however, that we are bound to assume that the plaintiff became the assignee of the bond with such rights and title as Musammatt Farbati and Musammatt Ganga Kunwar could under the circumstances give her. She is entitled to get a decree if she can make good her claim. Bearing in mind the facts of the case and the date of the institution of the connected suit, I think there can be little doubt that the defendants in the present suit put forward the reversionsers of Rup Ram to challenge the sale to Musammatt Durga Kunwar, and that in all probability there was some arrangement between them. We can, however, hardly blame the defendants for using any weapon they can to retain the property, in the absolute possession of which they have so long been. It has not been attempted to show that the finding of the court below that the sale by Musammatt Farbati and Musammatt Ganga Kunwar was made without legal necessity is wrong. In fact the argument did not challenge the decision in the connected appeal, save to contend that the decree actually passed went a little too far, in that it declared that Musammatt Durga Kunwar acquired no

right to the aforesaid bond. It was urged that she had acquired some title. She had acquired title as against her vendors. This, it seems to me under the circumstances of the present case, is purely a matter of form.

The argument put forward on behalf of the plaintiff appellant is as follows:—The widow represented the estate. She undoubtedly might have sued upon the bond and recovered the amount due thereon without being liable to account to any one. Therefore the plaintiff as her assignee has the same right that she had and she can sue upon the bond. Furthermore the rule by a Hindu widow is voidable, not void, and that therefore it cannot be questioned by the defendants in this suit. Those were the points argued. It seems to me that it by no means follows that because a Hindu widow can sue on foot of a bond and give a good discharge to the mortgagee that her assignee has the same right. A Hindu widow can sue upon a bond and collect the debt due to the estate because she is an heir and represents the estate, in other words by virtue of the fact that she is a Hindu widow and in possession in such. Nothing I think can be more clearly established than the proposition that a Hindu widow cannot alienate the property except for certain special purposes or legal necessity:—then when this *lector of Masulipatam v. (locally Venkata Narayanaiah) (1)* It has no doubt been held that the respondents cannot open the sale during the life of the widow save by the sanction of getting a declaration that the sale is not to be binding on them, and it is argued that the sale is voidable only and not void; that the case of *Bayly (proprietor) v. Krishnamoorthy (1)* is relied upon. That was a case in which the respondents and the respondent of the property in question which a Hindu widow could sue upon to get a declaration that the sale is voidable with, and that therefore the sale is voidable and not void; that but was voidable in the nature of a declaration of law, that might, if he thought fit, have been made by a court of law, but Court was there during the life of the widow, and the Court was a widow, in a sense, when the sale was made. If they found it was voidable, they would have set it aside. However, that was a question of law, and the Court was a court of law.

(2) *Bayly (proprietor) v. Krishnamoorthy* (1). It was argued that the sale was voidable, not void, and that therefore it cannot be questioned by the defendants in this suit. Those were the points argued. It seems to me that it by no means follows that because a Hindu widow can sue on foot of a bond and give a good discharge to the mortgagee that her assignee has the same right. A Hindu widow can sue upon a bond and collect the debt due to the estate because she is an heir and represents the estate, in other words by virtue of the fact that she is a Hindu widow and in possession in such. Nothing I think can be more clearly established than the proposition that a Hindu widow cannot alienate the property except for certain special purposes or legal necessity:—then when this *lector of Masulipatam v. (locally Venkata Narayanaiah) (1)* It has no doubt been held that the respondents cannot open the sale during the life of the widow save by the sanction of getting a declaration that the sale is not to be binding on them, and it is argued that the sale is voidable only and not void; that the case of *Bayly (proprietor) v. Krishnamoorthy (1)* is relied upon. That was a case in which the respondents and the respondent of the property in question which a Hindu widow could sue upon to get a declaration that the sale is voidable with, and that therefore the sale is voidable and not void; that but was voidable in the nature of a declaration of law, that might, if he thought fit, have been made by a court of law, but Court was there during the life of the widow, and the Court was a widow, in a sense, when the sale was made. If they found it was voidable, they would have set it aside. However, that was a question of law, and the Court was a court of law.

Hindu widow is void or voidable is immaterial in the present appeal. It has not been suggested that there is any distinction as to the class of property which a Hindu widow is restrained from alienating. She has no more right to assign that part of the estate which consists of mortgage rights than she has to assign the immovable property strictly so called. In either case she or her assignee must show that circumstances existed which made the alienation a valid alienation.

In the present case the sale by the widow has been successfully challenged unless we set aside the decree in the connected case. It is said, however, that this is a question between the reversioners on the one side and the widow on the other, and that third parties are not entitled to raise the question of the validity or invalidity of the sale. I do not think that this proposition is sound. Suppose that a Hindu widow alienated mortgage rights in a case in which it had to be admitted that she was not justified in making the alienation according to the Hindu Law. Suppose that her assignee sued on the bond and recovered the full amount, from the mortgagor. Suppose further that afterwards the reversioners obtained a declaration that the sale was void as against them. Would not the mortgagor in such a case in a suit by the reversioners after the death of the widow be obliged to pay the mortgage debt a second time, save perhaps to the extent of the interest which had accrued during the life-time of the widow? Could not the reversioners say:—"The widow is now dead and as against us the sale is a complete nullity?" It seems to me that it could be argued with irresistible force that the assignee of the widow could not give a good discharge for the mortgage debt until after it was established that the sale was a sale which a Hindu widow was entitled to make for legal necessity or for a pious purpose. It seems to me that where it is or may be necessary for the protection of a third party to question the validity of an alienation by a Hindu widow, such third party is undoubtedly entitled to do so. I do not think that an unauthorized sale by a Hindu widow can clothe her assignee with the Hindu widow's right to represent the estate and collect the debts. It is possible that under certain

circumstances it might be shown that the widow was driven to sell the mortgagee rights, as, for example, if she had no means to institute a suit to recover the amount. In such a case, however, I think the transaction would be justified on the ground of necessity or perhaps on the ground that under the special circumstances of the case it was the only possible way of realizing the debt due to the estate. In such a case I think the Court to be consistent, should hold that the whole estate had passed to the transferee and that the reversionsers were absolutely bound by the transfer made by the widow. I would dismiss the appeal.

BANERJI, J.—The question in this appeal which arises out of a

suit for sale upon a mortgage, is whether an assignee of the mortgage from a Hindu widow, on whom the mortgage rights devolved by right of inheritance, is entitled to maintain the suit, if the assignment was not made for legal necessity. The facts are these:—Tara Singh and Bahadur Singh executed the mortgage in question in 1879 in favour of Murlī Dhar. Upon the death of Murlī Dhar the mortgage devolved on his son Rup Ram, whose widow Musammāt Gangā, jointly with Musammāt Purbatī, the widow of Murlī Dhar, transferred the mortgage to the plaintiff on the 21st of May, 1909. As Musammāt Purbatī had no right to the mortgage, the transfer by her is of no consequence and the transfer must be deemed to be a transfer by Musammāt Gangā, who alone was entitled to the mortgage rights. It has been found by the court below that the transfer was without legal necessity, and this finding has not been challenged before us. It is by virtue of this transfer that the plaintiff is seeking to enforce the mortgage.

The defendants to the suit are the representatives of the mortgagors and certain purchasers of the mortgaged property in execution of a decree upon an earlier mortgage of 1872. The suit was contested by these transferees alone and they contended that the plaintiff had no right to sue. Murlī Dhar, the person in whose favour the mortgage in suit was executed, was not made a party to the suit under the earlier mortgage and therefore he or his representative in interest has still the right as subsequent mortgagee to redeem that mortgage and then to sell under the mortgage in his favour. This is what the plaintiff seeks to do in this case.

The court below has dismissed the suit, apparently under the impression that the transfer of the mortgage of 1876 made by Musamat Ganga being without legal necessity is absolutely void and that therefore the plaintiff is not entitled to maintain the suit. This view is clearly erroneous. An alienation by a Hindu widow without justifying necessity is not absolutely void, but it is voidable only. In any case it will hold good during the life-time of the widow. This has been so repeatedly held by their Lordships of the Privy Council that it is unnecessary to cite authorities. I may however refer to the recent case of *Bijoy Gopal Mukerji v. Krishna Mahishi Deb* (1).

The mortgage which is sought to be enforced in this suit secures a principal sum of Rs. 4,000. The plaintiff has purchased it for Rs. 7,500. It has been found in the connected suit brought by the reversers that she paid full consideration and that the sale is a real transaction. On this point there is no controversy in this appeal. The amount claimed by the plaintiff is Rs. 70,000. Apparently she is a speculator, but, that circumstance should not induce us to overlook the real question involved in the case. If she has a legal right to maintain the suit that right must be enforced. The decision of the case, in my opinion, depends on the nature of the estate held by a Hindu widow and her powers of alienation in respect of it.

The nature of a Hindu widow's estate was thus stated by their Lordships of the Privy Council in *Moniram Koli v. Keri Koli-tuni* (2):—"According to the Hindu law a widow who succeeds to the estate of her husband in default of male issue . . . does not take a mere life estate in the property. The whole estate is for the time vested in her absolutely for some purposes, though in some respects for only a qualified interest. Her estate is an anomalous one". Mr. Mayne describes it in the following terms:—

"Her (the widow's) absolute right to the fullest benefit of her life interest appears long to have been recognized . . . A woman is in no sense a trustee for those who may come after her. She is not bound to save the income. She is not bound to invest the principal. If she chooses to invest it, she is not bound to prefer one form of investment to another form as being more likely to

(1) (1907) I. L. R., 34 Cal., 329.
(2) (1880) I. L. R., 5 Cal., 776.

protect the interests of the reversioner. She is forbidden to commit waste or endanger the property in her possession, but short of that, she may spend the income and manage the principal as she thinks proper" (7th Edition, p. 840). She has no power absolutely to alienate the estate or a part of it, whether movable or immovable, except for certain purposes, but if she alienates it the transfer is, in every case, valid during her life-time and will have full effect and operation till her death. The only distinction between an alienation for a legal necessity and any other alienation is that the former endures after her death and is binding on the reversioners, whereas in the case of the latter it has full force and effect till her death, but may be avoided by the reversionary heirs of her husband after her death. From the operation of the above rule no class of property is exempt and it applies as much to mortgage rights as to any other rights. Therefore when a Hindu widow sells the mortgage rights which she inherited from her husband, but the sale is without legal necessity, the transferee, in my opinion, acquires all the rights which the widow had and could exercise during her life-time in respect of the mortgage. Such a transfer is not absolutely void, and I do not know of any authority which declares it to be so. There can be no doubt that the widow herself could bring a suit to enforce the mortgage. It is equally clear that she could give a full discharge to the mortgagee. If she received the mortgage money from the mortgagee and gave him a discharge, it would not lie in the reversioner to claim that money over again from the mortgagee. Her powers are not, as pointed out by Mr. Mayne, less than those of the manager of a family property. That a manager can give a complete discharge to the mortgagee is beyond controversy and doubt. Therefore, a Hindu widow also may do so. If she transfers her rights under the mortgage the transferee is, in my opinion, entitled to give a discharge to the mortgagee. If the mortgagee has obtained a discharge from the transferee he would not, any more than in the case of a discharge by the widow, be liable to the reversioner for the mortgage debt. The only right of the reversioner will be, as it seems to me, to prevent the widow, in the case of the widow, from wasting the corpus of the mortgage-estate, i.e., the amount of the mortgage debt inherited by her,

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and in the case of the transferee, to claim the amount of the mortgage due at the date of the death of the last male owner of the mortgage rights. This point, however, I am not called upon to decide in this case, as the reversioners are not parties to it and the contingency to which I have referred has not yet arisen. But I fail to see that there is any bar to the right of the transferee from the widow to enforce the mortgage. As the widow was entitled to do so, her transferee is, in my opinion, equally entitled. The transferees of the mortgaged property are in this respect in no better position than the mortgagor. Any other view is likely to cause hardship and in some cases would result in injury to the rights of the reversioners. Suppose the widow has not the means to defray the costs of bringing a suit to enforce the mortgage. If she cannot transfer it so as to give the transferee a right to sue upon the mortgage a claim for sale may become time-barred and the mortgage rights may become extinct. This will be to the prejudice of the reversioners. Again, if the widow has made an assignment of the mortgage she has no longer any right to sue on it. And if we hold that the transferee cannot sue, no suit can be brought upon the mortgage. The reversioner has no right to bring such a suit in the widow's life-time. The result will be that no one would be able to enforce the mortgage, and if the widow lives for more than twelve years after the mortgage has become due the mortgage will become incapable of enforcement. For these reasons I am of opinion that the plaintiff is entitled to maintain the suit, and I am unable to agree with the decision of the court below on this point.

The plaintiff is, of course, not entitled to sell the mortgaged property unless she redeems the prior mortgage under which the defendants, first party, purchased it, or she may do so subject to the prior mortgage. There are other questions involved in the suit which the court below has not decided. I would, therefore, allow the appeal and remand the case to that court for trial on the merits.

The decree of the Court accordingly followed the judgment of the Chief Justice and from that judgment the plaintiff appealed under section 10 of the Letters Patent.

The Hon'ble Pandit *Moti Lal Nehru* (Munshi *Gulzari Lal* with him), for the appellant:—

A Hindu widow could give a valid discharge to the creditors of her husband. The appellant stood in the shoes of the widow and could represent her. In dismissing her claim the court was protecting not the reversioner, but the debtors, because any future suit on the mortgage would be time-barred now. No question of legal necessity arose in the case, because for her life a widow could transfer all her rights. Whatever may be the nature of the property the rights of the widows were the same. The rights of reversioners could only arise when the mortgage money came into the hands of the widows or their transferees. There was no question about it yet. The plaintiff might never redeem, or the sum payable to the prior mortgagees may work out to a figure which the plaintiff might not be able to pay. Again, the reversioners were only entitled to the sum due on the mortgage on the death of *Rup Ram*. Whatever interest has accrued since then it is the property of the widow and through her of her transferee. A reversioner had no vested interests and was not entitled to a personal decree. The widow was not a trustee for the reversioners, nor has a case of waste been made out; *Hurrydoss Dutt v. Sreemutty Typoorannah Dossie* (1) *Golapchander Shastri's Hindu Law*, p. 426, summed up the law as to the estate enjoyed by a Hindu widow; *Bijoy Gopal Mukerji v. Krishna Mahishi Debi* (2) *Mothu Sudan Singh v. Rooke* (3).

Munshi *Govind Prasad* (Nawab *Muhammad Abdul Majid* with him), for the respondents:—

There was no dispute so far as the rights of a Hindu widow were concerned, but certain restrictions had been placed on those rights. She could sue on a mortgage and the reversioners could restrain her from waste, but here she had transferred her rights without any necessity. The question would be as to the position of the assignee. If the plaintiff got a decree and the property was sold, either the decree-holder or a third party would purchase the property. Before the sale the prior mortgage would have to be redeemed. If the purchase was made by a third party, the question

(1) (1856) 6 Moo. I. A. 1488. (2) (1907) I. L. R. 34 Cal. 329 (393). (3) (1898) I. L. R. 25 Cal. 1.

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would remain—could the reversioners proceed against the purchaser? The widow could not transfer the corpus. Again what exactly would be the corpus? Interest had gone on accumulating and was an accretion to the estate; Mayne, p. 628, 6th edition. Could a person holding under an assignment from another with a limited interest bring a suit upon the mortgage? It would mean a transfer of the corpus. The sale would not bind the reversioners.

The Hon'ble Pandit Moti Lal Nehru was not heard in reply. KNOX, TUDBAL and CHAMBER JJ:—The facts of this case as found by the court below and which are not now contested before us are briefly as follows:—

Rup Ram, a separated Hindu, died leaving a widow, Musammatt Ganga Kunwar, and a mother, Musammatt Parbati. One part of his estate was a debt secured by a simple mortgage over certain property. The widow and mother without legal necessity transferred this by deed of sale in favour of the present plaintiff appellant, who has brought this suit for sale impleading as defendants, (1) the mortgagees or their representatives,

(2) the transferors of the bond, and (3) certain prior mortgagees who had sued upon their bond without impleading the puisne mortgagee and having obtained a decree for sale had in execution thereof purchased the property and obtained possession.

The mortgagees did not defend the suit. The vendors admitted the claim. The prior mortgagees contested it, and the one defence with which we are concerned in this appeal was that the plaintiff had no right to sue, as the sale was without legal necessity and the widow could not transfer her right to sue.

During the pendency of this suit certain reversioners brought another suit against the two ladies and their vendee asking for a declaration that the sale in favour of the latter was null and void as against them, and that under it the vendee acquired no right to the bond. They claimed that their maternal grandfather Puran Mal and Rup Ram had been joint, and that on the death of the latter Puran Mal became the sole owner of the joint family property, and on his death their mother, whom they also impleaded, became entitled to a life interest.

transferred immovable property in this manner her transferee would be entitled to hold and possess it during her life-time and to recover possession of it by suit as against a third party who was wrongfully in possession; i.e., if the mortgagee in the present instance had been usufructuary, her transferee would clearly have been entitled to sue for possession, provided there was no bar of limitation. In the present case the widow is entitled to spend all income accruing on the debt after the death of Rup Ram and her transferee is "at least" entitled to recover this amount and to appropriate it to her own use. It is impossible to hold, therefore, that the latter has no power to sue. It may be that if the reversioners intervened in the suit of the assignee, the court might pass such a decree as would protect their interests and the corpus of the estate, but in the present case, though they are fully aware of the suit, they have not intervened to protect their own interests; on the contrary, they have preferred the suicidal course of attempting to destroy the corpus by preventing the recovery of the debt.

We agree with BARNETT, J., that the transferee acquired all the rights which the widow had, and could exercise, during her life-time in respect of the mortgage, one of those being the right to recover the debt. It is pleaded that if the mortgagees pay the debt they will be open to another suit by the reversioners on the death of the widow and may have to pay a second time. The widow is a party to the suit and the estate is duly represented, and we do not think that there is any force in the argument. It is urged that the sale for Rs. 7,500 in the present case of a debt amounting to over one lakh is, on the face of it, a wasting of the corpus by the widow. We can express no opinion on this at this stage, nor are we called upon to do so. The value of the property mortgaged and the amount of the prior burden are two other material factors which would have to be considered in this connection. But the point does not arise for our decision.

We, therefore, allow this appeal and set aside the decrees both of this Court and of the Additional Subordinate Judge, and reman-
 tant will have her costs in this Court in any event.
 Appeal allowed.

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Before Mr. Justice Sir Harry Griffin and Mr. Justice Channier.

PHAGGU MAL (DEFEENDANT) v. BABU DAL (PLAINTIFF).*

Contract—Sale—Goods sent to purchaser not in accordance with terms of contract—

Purchaser not bound to return goods to vendor.

When goods sent to a purchaser, professedly in execution of a contract of sale, are not of the kind which the vendor had agreed to supply, it is not the duty of the purchaser to see that such goods are returned to the vendor: it is enough if he gives notice to the vendor that the goods are lying at the place to which they were sent at the vendor's risk. *Grindaby v. Wells* (1) followed

IN this case the plaintiff agreed to supply the defendant with stone for building purposes to be delivered at Karnal in the Punjab. The stone was sent to Karnal, but on examination it was found to be wholly unsuitable to the purposes for which it had been supplied. The defendant then brought a suit against the plaintiff in the Punjab and obtained a decree for a refund of the price of the stone and for damages. The plaintiff subsequently sued the defendant for the return of the stone. The court of first instance dismissed the suit, but this decree was reversed on appeal and a decree given in favour of the plaintiff. The defendant thereupon appealed to the High Court.

Babu Sital Prasad Ghosh, for the appellant.

The Hon'ble Dr. Tej Bahadur Sagar, for the respondent.

GRIFFIN and CHANNIER, JJ:—The plaintiff in this case, who is respondent here, agreed to supply the defendant with stone for building purposes. The stone was delivered at Karnal, but on examination it was found to be wholly unsuitable to the purposes for which it was supplied. The defendant then brought a suit against the plaintiff in the Punjab and obtained a decree for a refund of the price of the stone and for damages. The plaintiff has now brought this suit asserting that it was the duty of the defendant to return the stone to him. The defendant's plea is that he is not bound to put himself to the expense and trouble of returning the stone, and that it was the business of the plaintiff to take the stone

* Second Appeal No. 746 of 1912, from a decree of Girraji Kishore Datt, Judge, Small Cause Court, exercising the powers of a Subordinate Judge, of Agra, dated the 14th of May, 1912, reversing a decree of Raja Ram, Munsif of Agra, dated the 26th of October, 1911.

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away if he was so minded. The case appears to be covered by a decision of the Court of Common Pleas in England in the case of *Grimshby v. Wells* (1). We hold that it was not the duty of the defendant to return the stone, and that the plaintiff has no cause of action against him. It was sufficient for the defendant to notify to the plaintiff that the stone was lying at Karnal at his risk. That, and more than that, has been done by the defendant in the present case. The decision of the lower appellate court cannot be supported. We allow this appeal, set aside the decree of the lower appellate court and dismiss the plaintiff's suit with costs in all courts.

Appeal allowed.

Before Sir Henry Rickards, Knight, Chief Justice, and Mr. Justice Twissell.

MEGHU RAI (DEFEENDANT) v. RAI KHELEWAN RAI AND ANOTHER
(PLAINTIFFS) AND MATA KUNWAR AND OTHERS (DEFEENDANTS).*

Hindu law—Hindu widow—Suit for declaration that mortgage by widow did not affect plaintiff's reversionary rights—Plaintiff's not nearest reversioners.

Where plaintiffs sued as next reversioners for a declaration that a mortgage executed by a Hindu widow was not binding on them, and it was found that as a matter of fact even the nearest of the plaintiffs could only succeed to the estate if four males and one female died in his life-time; it was held that the plaintiffs ought not to have a decree.

THIS was an appeal under section 10 of the Letters Patent from a judgement of a single Judge of the Court. The facts of the case sufficiently appear from the judgement under appeal, which was as follows:—

"This was a suit brought by the reversioners to the estate of Ram Saran Rai, to set aside the mortgage made by his widow, Musammatt Mata Kunwar, in favour of the second defendant. It has been found by the lower appellate court that Ram Saran Rai left a son, who predeceased him; that the defendant Musammatt Talaga Kunwar, who has some minor children, is his daughter, and that the defendant Mohendar Rai is Ram Saran Rai's grandson by another daughter who has died. The plaintiffs are admittedly the reversioners who would come in after the sons of Ram Saran Rai's daughters. It has been found that the mortgage in question was without justifying necessity. The court of first instance decreed the claim, but the lower appellate court has dismissed it on the ground that between the plaintiff and Musammatt Mata Kunwar, who made the alienation, there intervene Talaga Kunwar, her sons, and the defendant Mohendar Rai. It was alleged in the plaint that the persons who were as next reversioners than the plaintiffs were in collusion with Musammatt Mata Kunwar and the transferees from her. It is so, the plaintiffs are entitled to

maintain the suit, as held in *Rani Anand Kunwar v. The Court of Wards* (1). The court below did not frame any issue on the question of collusion. As there are materials on the record which would enable this Court to come to a finding on the point, I have not deemed it necessary to refer an issue to the lower appellate court. Musammatt Taluqa Kunwar, the daughter of Ram Saran Rai, in her written statement, supports the mortgage and so does Musammatt Mata Kunwar, who is the guardian of Mohendar Rai. They live with Mata Kunwar, so that the persons who are nearer reversionsers than the plaintiffs are in collusion with the first two defendants. That being so, the plaintiffs are entitled to a declaration that the mortgage made by the first defendant will not affect their reversionary rights. I accordingly allow the appeal, set aside the decree of the lower appellate court and restore that of the court of first instance with costs in all courts."

The defendant appealed.

Mr. W. Wallach, The Hon'ble Dr. Sundar Lal, Munshi Gobind Prasad, and Munshi Benode Behari, for the appellants.
Mr. M. L. Agarwala and Munshi Gokul Prasad, for the respondents.

RICHARDS, C. J. and TUDBAL, J.—This appeal arises out of the following circumstances:—The plaintiffs sued alleging that they were the reversionsers to a property which had been alienated by Saran Rai, and mother of one Jagmohan. The claim was that the mortgage made by the Musammatt Mata Kunwar should be declared not to be binding upon the plaintiffs as reversionsers. There was no allegation in the plaint that the plaintiffs were suing as distant reversionsers, the nearer reversionsers having done something to prevent them from bringing the suit. No such allegation was necessary, because, as already mentioned, the claim of the plaintiffs was that they were the next reversionsers. This contention was based upon the allegation that Jagmohan survived his father Ram Saran Rai. The lower appellate court found that the plaintiffs' allegation that Jagmohan survived Ram Saran Rai was not only false but was supported by fabricated evidence. The learned District Judge gives very cogent reasons for this finding, and in any event we are bound by it in second appeal. The result of this finding and a further finding of the lower appellate court is that even the nearest of the plaintiffs can only succeed to the estate if four males and one female die in his life-time. The learned District Judge dismissed, and we think rightly dismissed, the plaintiffs' suit on these findings.

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The learned Judge of this Court seeing an allegation in the plaint that there had been collusion between the transferee and the defendants 3 and 4 raised the issue whether or not the defendants 3 and 4 had done something which rendered them unfit to protect the estate and having come to a finding upon this issue in favour of the plaintiffs, decreed the plaintiffs' suit. We doubt very much that the plaintiffs would ever have brought the present suit at all if they had to do so in the capacity of reversionsers who had four males and a female in front of them, and certainly suits for a declaration by remote reversionsers are not to be encouraged. The learned Judge of this Court seems to have overlooked the fact that there were reversionsers nearer than the plaintiffs who were not even parties to the suit at all, and other nearer reversionsers were minors. Had the plaintiffs brought the present suit upon the allegation that they were the distant reversionsers, and brought the suit as such, we would not be disposed to interfere with the decision of the learned Judge of this Court merely on the ground that there was no specific allegation in the plaint that the nearer reversionsers had precluded themselves from bringing the suit; but we think, in the circumstances of the present case and after the finding of the court against the plaintiffs as to their being the next reversionsers to the property, that it was not right to read into the plaint an allegation that they were bringing the suit as distant reversionsers because the nearer reversionsers had either precluded themselves from bringing this suit or had refused to do so. We think that the present appeal ought to be allowed. We accordingly allow the appeal, set aside the decree of this Court and restore the decree of the lower appellate court. The appellant will have his costs of both the hearings in this Court.

Appeal allowed.

APPELLATE CRIMINAL.

1912
June, 27.

Before Mr. Justice Karanmat Husain and Mr. Justice Tubball.

EMPEROR v. KANHAI AND OTHERS.*

Grievous hurt—Common intention—Deadly assault with lathis on an unarmed person—Presumption.

Four persons armed with lathis attacked and severely beat a fifth, who was unarmed, over a dispute about irrigation. The person attacked died in consequence of this beating, and it was found that he had received several severe blows on the head, the result of which was that the bones of the skull were broken to pieces, and also other injuries about the body, most of the injuries having probably been inflicted whilst the person attacked was on the ground; but the evidence did not disclose which of the assailants caused which of the injuries. *Held*, that all four assailants were properly convicted of murder under the fourth clause of section 300 of the Indian Penal Code, and that the inference was not justified that common intention of the assailants was not more than the causing of grievous hurt.

THE facts of this case were as follows:—

In the month of August, 1911, one Sujan was irrigating his field, when four persons—Kanhai, Diwan, Karan Singh and Ganga Bahai—came up armed with lathis and told him to stop, because they wanted to irrigate their own. A dispute ensued, and the four attacked Sujan, who was unarmed, and beat him severely so that he died. The medical evidence disclosed that several blows were inflicted on Sujan's skull, which resulted in a compound fracture thereof, the bones being broken into many pieces. In addition to these injuries to the head there were six injuries on other parts of the body, and it appeared that most of the injuries had been inflicted whilst the deceased was lying on the ground.

The four assailants were tried by the Assistant Sessions Judge of Aligarh and convicted under section 325 of the Indian Penal Code and sentenced to five years' rigorous imprisonment each. They appealed to the High Court, and their convictions and sentences were set aside and a fresh trial ordered. On the second trial they were convicted of the offence of murder and sentenced to transportation for life. From these convictions and sentences the four accused again appealed to the High Court.

Babu Satya Chandra Mukerji (for whom Babu P. Narain Lal Benerji), for the appellants.

The Assistant Government Advocate (Mr. R. Malcomson), for the Crown.

KANAYAR HUSAIN and TUDBAL, JJ:—The four appellants Kanhai, Diwan, Karan Singh and Gangra Sahai have been convicted of the offence of murder and have been sentenced to transportation for life. They were originally tried and convicted by the Assistant Sessions Judge under section 325, Indian Penal Code, and sentenced to five years' rigorous imprisonment each. They appealed to this Court and the learned Judge before whom their appeals came set aside the convictions and sentences and ordered them to be re-tried for the offence of murder under section 302, Indian Penal Code. They have now been tried and convicted of that offence. The facts established by the evidence are briefly as follows:—In the month of August last, when there was a great demand for water for the purpose of irrigation and all cultivators were eager to get as much water as possible, the deceased was watering his field early in the morning before day-break, when the four accused, armed with *lathis*, went up to him and demanded that he should cease irrigating his field, so that they might irrigate their own. A wrangle ensued. The deceased was unarmed and defenceless. Finding that he was obstinate and would not give way, the four accused attacked him with their *lathis*. The medical evidence shows that several blows were inflicted on the skull, which resulted in the compound fracture thereof, the bones being broken into many pieces. In addition to these injuries on the head there were six injuries on other parts of the body. It is therefore quite clear that the accused inflicted a very severe beating, and that most of the injuries must have been inflicted when the deceased was lying on the ground. It is urged in their defence that the evidence does not disclose which of the injuries were inflicted by each of the accused respectively; that their common intention cannot possibly have been more than to voluntarily cause grievous hurt to the deceased, and that therefore, they ought to have been convicted under section 325 of the Indian Penal Code. We are unable to agree with this contention. The circumstances of the case and the fact that the accused were all armed with *lathis*; that the deceased was defenceless and unarmed; that the beating must have

been a prolonged one, and that several blows were inflicted on the skull completely smashing it, leave very little doubt that the intention of the accused was to inflict such bodily injury as was likely to cause death. The fourth clause of section 300 of the Indian Penal Code applies, and the accused have been rightly convicted of the offence of murder as defined in the Code. The lesser of the two sentences has been imposed, and there is no doubt as to the guilt of the accused. We therefore dismiss the appeal and maintain the convictions and sentences.

[*Cf. Emperor v. Bhola Singh*, I.L.R., 29 All., 282—Ed.]

PRIVY COUNCIL.

DEBI BAKSH SINGH (PLAINTIFF) v. HABIB SHAH (DEFENDANT).

[On appeal from the Court of the Judicial Commissioner of Oudh, at Lucknow.]

Plaintiff, non-appearance of—Dismissal of suit—Order setting aside dismissal when plaintiff was found to have been dead at the time suit was dismissed—Civil Procedure Code (1908), order IX, rules 8 and 9—Order XXII, rules 3 and 9—Sections 115 and 161—Rules and orders applicable only to defaulters wrongly applied in case of dead party.

On the non-appearance of the plaintiff in a suit against the respondent an order was made on the 4th of July, 1911, dismissing the suit for default. The plaintiff was in fact dead at the time the order was made, and his son the appellant was engaged in performing his father's funeral ceremonies and was unable to attend court. These facts were brought to the notice of the Deputy Commissioner in an application made under order XXII, rules 3 and 9, of the Civil Procedure Code (Act V of 1908) by the appellant as the heir and legal representative of the plaintiff, which was filed and accepted by the Deputy Commissioner within the time allowed by law and an order was made on the 11th of September setting aside the dismissal of the suit, and substituting the name of the appellant on the record in place of the deceased plaintiff. On an application for revision of the Deputy Commissioner's order of the 11th of September made by the respondent under section 115 of the Code to the Court of the Judicial Commissioner, that Court reversed the order, and confirmed that decision on review, mainly on the grounds that the order of the 4th of July dismissing the suit was a proper order under order IX, rule 8, of the Code; that the appellant's application to set aside that order was not within time, and was therefore barred, and that order XXII, rule 9, of the Code applied only to a still pending suit, and not to one that had been dismissed.

Held (reversing the decisions of the Court of the Judicial Commissioner) that those decisions were vitiated by applying to a dead man orders and rules

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applicable only to a mere defaulter. An "abuse of the process of the Court" within the meaning of section 151 of the Code had occurred by the course adopted in the Judicial Commissioner's Court. Quite apart from that section, any Court might rightly have considered itself to possess inherent power to rectify the mistake inadvertently made in dismissing the suit. The order of the Deputy Commissioner setting aside the dismissal was manifestly sensible and correct, and their Lordships restored it, and remitted the case to India to be disposed of on the merits.

Appeal from a judgement and decree (5th December, 1911) of the Court of the Judicial Commissioner of Oudh (affirmed on review on the 20th of February, 1912), which reversed on appeal an order (11th September, 1911) of the court of the Deputy Commissioner of Bahraich.

On the 3rd of May, 1911, Raja Maneshwar Baksh Singh, the father of the appellant, brought in the court of the Deputy Commissioner of Bahraich, a suit against the respondent for the recovery of arrears of rent under a lease, to which suit the respondent filed his defence on the 31st of May, and the suit was fixed for hearing on the 4th of July, 1911; Raja Maneshwar Baksh Singh died on the 21st of June, 1911; and on the day fixed for hearing the suit was dismissed in default for non-appearance of the plaintiff.

On the 3rd of August, 1911, an application was made on behalf of the appellant as the heir and legal representative of his father, by his general agent, to the clerk or General Superintendent of the office of the Deputy Commissioner, under order XXII, rule 3, and order IX, rule 9, of the Civil Procedure Code (Act V of 1908) in which the appellant stated that owing to the death of his father, and his being engaged in the performance of the necessary funeral ceremonies he had been unable to be present in court on the 4th of July; and prayed that the suit which had been dismissed in default might be restored, and that his name might be substituted for his father's on the record of the suit.

When leaving the application with the clerk, the appellant's agent said he had been waiting in the court since 2 p.m. (it was then 4.30 p.m.) to present it to the court, but that as the Deputy Commissioner had not taken applications on that day, he had been unable to do so. The General Superintendent reported this statement to the Deputy Commissioner, who on the 4th of August, 1911, made the following order:—"He was in my court and might have filed it then. It may be accepted."

On the 11th of September, 1911, the Deputy Commissioner granted the application and made an order in the terms set out in the judgment of their Lordships of the Judicial Committee.

On the 9th of October, 1911, the respondent applied to the Court

of the Judicial Commissioner of Oudh under section 115 of the Civil Procedure Code (Act V of 1908) for revision of the orders of the Deputy Commissioner of the 4th of August, and the 11th of September, 1911, and on the 5th of December, 1911, that Court (Mr. B. LINDSAY, 1st Additional Judicial Commissioner, and Mr. M. RAJIO, 2nd Additional Judicial Commissioner) held that the application ought to have been dismissed by the Deputy Commissioner because the appellant had not reported to the authorities his succession to his father Alamoshar Bakhsh Singh as required by clause 5 of section 34 of the United Provinces Land Revenue Act (III of 1901); and because the application could not be entertained by the Deputy Commissioner as having been made more than 30 days after the dismissal of the suit. The clerk of the court, it was said, had no authority to receive the application, which therefore must be considered as not having been received until the 4th of August, 1911, and consequently out of time; that order XXII, rule 3, of the Civil Procedure Code, 1908, did not give the legal representative six months within which to set aside the dismissal of the suit; and that the appellant had produced no evidence in support of his application. The Judicial Commissioner's Court accordingly set aside the orders of the Deputy Commissioner which were under revision.

The appellant thereupon applied for a review of the judgment of the 5th of December, 1911, mainly on the grounds that the dismissal of the suit under order LX, rule 8, was *ultra vires*, that the court of the Deputy Commissioner had inherent jurisdiction under section 151 of the Civil Procedure Code to set aside his own order, and that no effect had been given to order XLII, rule 8, of the Code.

The Court of the Judicial Commissioner (consisting of the same Judges as before) said—

"There is no doubt that the Deputy Commissioner's order of dismissal was an *ultra vires* order, and that the court of the Deputy Commissioner had inherent jurisdiction to set aside his own order, and that no effect had been given to order XLII, rule 8, of the Code."

appear. . . the court shall make an order that the suit be dismissed. There can be no doubt whatever that on the 4th of July, the plaintiff did not appear, and in the absence of any information as to the cause of his non-appearance we fail to see how the court could have acted otherwise than it did. It is said that the Deputy Commissioner could have ignored this previous order or could have set it aside under section 151 of the Code of Civil Procedure. But the case cannot be brought within the terms of section 151, for the court could not take action under that section seeing that a procedure for setting aside an order of dismissal is specially provided in order IX of the Code.

"It is said that the effect of our decision is to set at naught all the provisions of the Code of Civil Procedure and the Limitation Act, which allow a period of six months within which the representative of a deceased party can apply to have his name substituted on the record. No doubt

six months from the date of the decease of the plaintiff are allowed to his legal representative for the purpose of making an application to have his name brought on the record so as to enable him to continue the suit. But a reference to order XXII in general and to rule 3 of that order in particular shows clearly that what is contemplated in the cases referred to in order XXII is an application made while a suit is still pending. To take the words contained in rule 3 of that order—"The court . . . shall cause the legal representative of the deceased plaintiff to be made a party, and shall proceed with the suit." These last words obviously refer to a case which is still undecided. The court having made the substitution continues the hearing of the suit from the point to which it had advanced at the time when the deceased party died. In the present case the suit had come entirely to an end by virtue of the order of the 4th of July, 1911, by which the suit was dismissed for default and no substitution of the name of Debi Bakhsh Singh as plaintiff in place of his deceased father could be made unless and until the suit had been revived by means of an order passed under order IX, rule 9. . . . Debi Bakhsh Singh had in any case a remedy by application under order IX, rule 9, and he availed himself of it, but did not do so within the time (30 days from the date of the order of dismissal) prescribed by law. We are unable, therefore, to see how it can be said that our decision of the 6th of December, 1911, in any way ignores the provisions of the Code of Civil Procedure and the Limitation Act."

The application for review was consequently dismissed.

On this appeal, which was heard *ex parte*—

De Gruyther, K. C., and S. A. Kyffin for the appellants contended that pending an application to substitute on the record the appellant's name as heir to his deceased father, the suit had been wrongly dismissed for default of prosecution; and when it was brought to the notice of the Deputy Commissioner that the plaintiff's non-appearance was owing to his having died before the order dismissing the suit was made, the Deputy Commissioner had rightly held that the order of dismissal was not under the circumstances a proper order, and that the appellant

was entitled to continue the suit. The appellant applied within the time limited by law to be put on the record in place of his father, and was entitled to the further relief that the order of the 4th of July dismissing the suit should be set aside. The appellant's application having been admitted, and accepted by the order of the Deputy Commissioner as being within time, could not, it was submitted, be regarded as being barred by limitation. The provisions of clause 5 of section 34 of the United Provinces Land Revenue Act (III of 1901) did not operate as a bar to the continuance of the suit. The Court of the Judicial Commissioner had no power under the Civil Procedure Code (Act V of 1908) to interfere with the orders made by the Deputy Commissioner on the 4th of August and the 11th of September, 1911: any defect in procedure was cured by the powers conferred on the Deputy Commissioner by section 151 of the Code which justified his making the orders. The orders of the Court of the Judicial Commissioner were erroneous and should be set aside. Reference was made to the Civil Procedure Code (Act V of 1908), section 115; order IX, rules 8 and 9; order XXII, rule 3, clauses (1) and (2); order XXII, rule 9, clauses (1) and (2): and the Limitation Act (IX of 1908), schedule I, article 176.

1913, April, 29th.—The reasons for the report of their Lordships were delivered by Lord SHAW:—

The appellant's father, Raja Maneshwar Bakhsh Singh, instituted a suit against the respondent for payment of sums amounting to Rs. 15,908. The plaint was filed on the 3rd of May, 1911, in the court of the Deputy Commissioner of Bahraich. The respondent filed his written statement on the 31st of May, 1911. On the 4th of July the following occurred before the Deputy Commissioner:—“On the case being called to-day the plaintiff was not present. I therefore dismiss the claim. Costs upon plaintiff.”

The fact, unknown to the Deputy Commissioner, was that the plaintiff was dead. He had died about a fortnight before, namely, on the 21st of June. It is plain to their Lordships that, upon this being pointed out, it was the duty of the Deputy Commissioner to rectify the situation. This duty Mr. Clarke, the Deputy Commissioner, seems fully to have recognized. It requires no words of their Lordships to show the inapplicability of rules or orders dealing with the case of the non-appearance of a suitor to the

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situation which arises when the suitor is dead. The principle of forfeiture of rights in consequence of a default in procedure by a party to a cause is a principle of punishment in respect of such default, but the punishment of the dead, or the ranking of death under the category of default, does not seem to be very stateable. The deceased plaintiff's son took the proper steps to have his name substituted in place of his deceased father under order XXII, rule 9, of the Civil Procedure Code. He did so on the 3rd of August, which was well within the period of six months' limitation under article 176 of the first schedule of the Indian Limitation Act of 1908. Some question arose as to the application being time-barred, but the latter was very properly accepted by Mr. Clarke. The appellant had also taken the proper steps to have a report of his succession made under section 34 of the Land Revenue Act.

On the 11th of September, 1911, the Deputy Commissioner pronounced the following order:—

"The case was dismissed as no one appeared on the previous hearing. This was due to the death of the Raja of Malanpur. The other side claim that the re-hearing is barred under section 34 of the Land Revenue Act, but that section clearly requires a report of the succession, which has already been made. It is argued that the application is time-barred, but it was filed and accepted under my order within time. But I cannot allow any technicality to obscure the fact that the case was only not heard because of the calamity which prevented appellant's putting up this case. Under these circumstances I accept this application, and fix the 27th of October for hearing of issues, if necessary, and proof."

This order by the Deputy Commissioner is so manifestly sensible and correct that their Lordships are of opinion that it ought to be reverted to, and the case proceeded with accordingly. On the 5th of October, 1911, however, the Court of the Judicial Commissioner of Oudh reversed the Deputy Commissioner's order, and on the 20th of February, 1912, on review, that judgment was affirmed. In their Lordships' opinion these judgments cannot stand, being vitiated by applying to a dead man orders and rules applicable to a defaulter. By the Code of Civil Procedure, section 151, it is provided that "nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice, or to prevent abuse of the process of the Court." In their Lordships'

opinion such abuse has occurred by the course adopted in the Court of the Judicial Commissioner. Quite apart from section 151, any Court might have rightly considered itself to possess an inherent power to rectify the mistake which had been inadvertently made. But section 151 could never be invoked in a case clearer than the present, and their Lordships are at a loss to understand why, apart from points of procedure and otherwise, it was not taken advantage of.

Their Lordships have humbly advised His Majesty that the appeal be allowed, the order appealed from set aside and the order of the Deputy Commissioner of the 11th of September, 1911, restored, and that the appellant be found entitled to the costs of the proceedings since the 3rd of August, 1911, in India, and to the costs of this appeal. The suit will be remitted to India to be disposed of on the merits.

Appeal allowed.

Solicitors for the appellant:—T. L. Wilson, & Co.

J. V. W.

BRJRAJ SINGH AND ANOTHER (DEFEENDANTS) v. SHEODAN SINGH AND OTHERS
(PLAINTIFFS) 2 APPEALS CONSOLIDATED.

[On appeal from the High Court of Judicature at Allahabad.]

Hindu law—Partition—Requisites for partition created by so-called will in life-time of father dividing family property among his sons and taking no share himself—Double share to eldest son—Unequal partition under alleged custom—Provision for forfeiture on mismanagement or bad behaviour—Conduct of parties after execution of document of partition.

By a document called a "will" dated the 26th of November, 1895, the father and head of a Hindu joint family governed by the Mitakshara law recorded a division of the ancestral family property amongst his three sons (giving himself no share but allotting a double share to his eldest son). The document recited that, "my three sons are at present fully qualified to conduct the business. Therefore in order to avoid a dispute after my death I have at present, while in a sound state of body and mind, and of my own free will and accord, divided the property among my sons, heirs, as follows." Then followed the details of the division. There was a provision that, "If at any time come back from pilgrimages and find mismanagement or character of any one bad then I shall have power to cancel this will which shall be enforced from the date of its execution" and the document concluded as follows:—"All the three sons were put in separate possession of the estate in the beginning of the year 1303 B.S."

* *Present*:—Lord SHAW, Lord MOUTON, Sir JOHN EDGAR, and Mr. AMERY ATT.

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(September 1895) "I have no other heir having a right besides those mentioned in this will. I have therefore executed this will in order that it may serve as evidence." Mutations of the various shares were subsequently made into the names of those to whom they were separately allotted, and the evidence showed that the division had been assented to, acquiesced in and acted upon by the sons up to 1905. In a suit brought in September, 1905, four years after the father's death by the two younger sons for partition of the property which they alleged to be joint and undivided and of which they claimed to be entitled to two one-third shares.

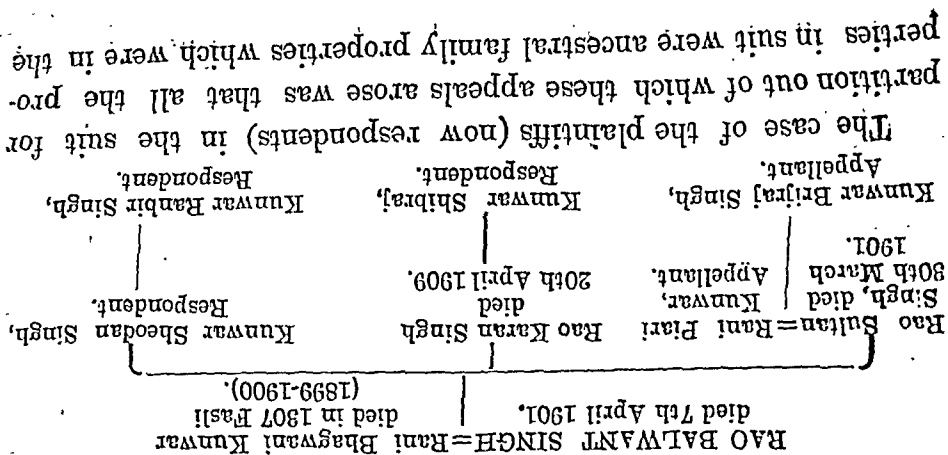
Held (reversing the decision of the High Court) that the document of the 20th of November, 1895, was not a will but was intended to operate from its date, and was in fact a family arrangement contemporaneously made and acted upon by all parties, the effect of which was, under the circumstances of the case, to create a partition of the joint ancestral property. There was nothing in the fact that the document was called a will which invalidated the partition which was undoubtedly made in fact, and which was acted upon for ten years without any dispute or misunderstanding as to the respective rights of the parties under it.

Held also that the provision in the will giving the father power to cancel it in certain events, evidenced a contractual condition which the sons accepted in order to obtain the partition which gave them immediate possession of the property and viewed thus the contractual acceptance of a power of forfeiture in case of bad behaviour would not be sufficient to prevent the partition operating *in personam*.

Two consolidated appeals (86 and 87 of 1912) from two judgments and decrees (17th May, 1910) of the High Court at Allahabad, which partly affirmed and partly reversed a judgment and decree (30th September, 1907) of the court of the Additional Subordinate Judge of Aligarh.

The facts of the case are sufficiently stated in the judgment of their Lordships of the Judicial Committee.

The parties and their relationship appear from the following genealogical table.



joint possession and enjoyment of the members down to the date of the suit, 13th September, 1905, and that they (the plaintiffs) were entitled to two equal third shares thereof on partition.

The principal and now the only material defences of the defendants (now appellants) were (1) that the properties in suit were not ancestral but were the self-acquired properties of Rao Balwant Singh, and had been validly disposed of by him by his will; (2) that assuming the properties were ancestral a partition had been effected by Rao Balwant Singh in his life-time to which all his three sons had assented; and (3) that by family custom the eldest son was entitled on partition to a double share equivalent to a moiety of all the properties in suit.

On defence (1) the Subordinate Judge held that all the properties in suit were ancestral, and that holding was not disputed on appeal to the High Court.

The document purporting to be a will was dated the 26th of November, 1895, and was put in evidence by the defendants. It was executed by Rao Balwant Singh and declared, so far as is material to this report, as follows:—

"I have often been ill for the last 3 or 4 years and am unable to move about. The work in connection with my estate &c. is conducted through Chitranji Lal, general attorney, and Rao Sultan Singh, my eldest son. Now, I intend to sever my connection with the world, go on pilgrimages and visit other countries. Life is transient and uncertain. My three sons are at present fully qualified to conduct the business. Therefore in order to avoid a dispute after my death I have at present, while in a sound state of body and mind and of my own free will and accord, divided the property among my sons, heirs, as follows":

Then, after giving certain specific villages to his second and third sons and certain property to "my wife the Rani Sahib," Rao Balwant Singh gave other specific villages to—

"My eldest son, Rao Sultan Singh, and have installed him to the gaddi in my place. He shall continue to conduct the business like myself according to the custom of the family, and he being the head of the family was given a greater share than those given to both the sons aforesaid. All three sons and the Rani Sahib shall, after payment of the Government revenue, bring the profits of the villages into their valid use. They shall have their names recorded in the revenue papers as provided by the will. After the death of the Rani Sahib, the wife of Rao Sultan Singh, shall according to the custom of the family be the owner of the entire *st.* lands (except the *st.* land in the village of Badri) belonging to the said Rani Sahib entered in papers, and in possession and enjoyment of the Rani Sahib. The Rani Sahib shall

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have the *stir land* in the village of *Badri* recorded in the name of the wife of *Kunwar Shoodan Singh* because the share of *Kunwar Shoodan Singh* is less than that of *Kunwar Karam Singh*, therefore the *Rani Sahib* is permitted to have the *stir land* aforesaid recorded in the name of the wife of *Kunwar Shoodan Singh*. "The property and the village of *Harsena*" (given to his wife the *Rani Sahib*) "is divided into three equal shares amongst the grandsons, one of which shares was given to *Brijraj Singh*, son of *Rao Sultan Singh*, one to *Shibraj Singh*, son of *Kunwar Karam Singh*, and one to the son of *Shoodan Singh*. . . . If at any time come back from pilgrimages and find mismanagement or character of any one bad then I shall have power to cancel this will which shall be enforced from the date of its execution. All the three sons were put in separate possession of the estate in the beginning of the year 1303 *Bash*. I have no other heir having a right besides those mentioned in this will. I have therefore executed this will in order that it may serve as evidence."

The principal question for decision in the present appeal was whether there had been a partition of any part of the family properties binding on the plaintiffs during the life-time of *Rao Balwant Singh*.

As to this the Subordinate Judge held that a valid partition had been so made of the villages and certain other property of the family, but not of the house properties or movables. He treated the so-called will as a deed of partition, under which a family arrangement had been come to for a division of the properties (except as above) which had been acquiesced in by the plaintiffs who were therefore estopped from impeaching it as being an unequal partition. He found that the books of account on which the plaintiffs relied were fabricated; and that after the execution of the so-called will *Rao Balwant Singh* had lived the life of an ascetic. He accordingly made a preliminary decree for partition only of the house property and movables (the property he found to be undivided) and referred the matter to commissioners to ascertain how division should be carried out in detail, eventually, after consideration of their report passing a final decree in terms of his judgment then given.

As to the custom alleged by the defendants the only evidence was *wajib-ul-arzes* of 1873 and the Subordinate Judge said:

"It is stated in some of them that the *gaddinashin* is entitled to a double share, and in the rest that he is entitled to one share more than the others which means the same thing, that is, he will have two shares whereas the others will have one share each. The plaintiffs' objection to these *wajib-ul-arzes* is that they were dictated by one man only, namely, *Rao Balwant Singh*. But he was

the best man to know his family custom and his statements are admissible under section 49 (clause 1) of the Evidence Act and no evidence is adduced to the contrary.

But let it be supposed that every bit of the property, movable as well as immovable, was ancestral and the plaintiffs 1 and 2 and Sultan Singh had absolutely equal rights to share it. Still by the Hindu law Balwant Singh was entitled to a share equal to his sons, and he could give his share to Sultan Singh and the result would be exactly that Sultan Singh would have got double of what each of his two brothers would get."

Both parties appealed from this decision to the High Court, the plaintiffs disputing the partition of the villages and lands under the will and the defendants asserting that a complete partition had been made thereby including the house property and movables.

The appeals were heard by Sir JOHN STANLEY, C.J., and GRIFFIN J. who held that the document dated the 26th of November, 1895, could not be treated as a deed of partition, but was intended to operate only as the will of Rao Balwant Singh, that the account books relied on by the plaintiffs were genuine and supported the plaintiffs' contentions that no real partition of any of the family properties was effected in the life-time of Rao Balwant Singh, that his two younger sons had not assented to any final division of the estate, and that the allocation of the various villages among the different members of the family, and the mutation of names in the revenue records were only intended to provide for the management of the estate the enjoyment of the properties remaining joint until the date of suit. The High Court also held that the defendants had failed to establish that Rao Balwant Singh had retired from the world after the date of the will, or had become an ascetic, that the evidence showed that he continued to superintend the management of the properties until his death and that the family custom alleged by the defendants was not proved. The plaintiffs' appeal was accordingly allowed, a general partition of the family properties was decreed and the cross-appeal of the defendants was dismissed, a separate decree to that effect being passed. In concluding their judgment the High Court said:—

"It is found by the Court below that the arrangement made by Rao Balwant Singh was in the nature of a family settlement which was accepted by the members of the family and acted upon and that the plaintiffs are estopped from impeaching its validity. We cannot agree in this view. Rao

that and Singh no doubt intended to ensure the management of the estate to the sons and had mutation of names effected in their favour for this purpose; but, as it was not in the language of his will, he did not intend to part with the estate over it during his life. For the purpose of the management of the estate it was necessary that mutation of names should be effected, otherwise his sons would be unable to maintain suits against tenants or make settlements. It was with the object of making their management effective that mutation of names was effected, and the making of a will may have been a device whereby mutation could be obtained. Revenue officers will not effect mutation unless the declaration or transfer of property is proved to their satisfaction. In the orders for mutation before us it will be found that the transfers of the property are described as having taken place under the will of Rao Balwant Singh. It is true that the will was not operative during Rao Balwant Singh's life and ought not to have been acted upon, but this appears to have escaped the notice of the revenue officials. They were misled into believing that it effected a transfer.

"Then it is said that on the death of Sultan Singh his brothers assented to the name of Sultan Singh's son being recorded as owner in his place and it is contended that in view of this and of their acquiescence in the arrangement made by their father, Rao Balwant Singh, the plaintiffs are estopped from setting up the case that there was no binding partition of the family property. The parties were, during the life-time of Rao Balwant Singh, on friendly terms and remained so for about 27 years after his death, and it was quite natural that on the death of Sultan Singh mutation of names should be effected in favour of his son in respect of the property of which he was the recorded owner. It was also not unnatural that the son which stood in the name of Bhagwan Kunwar, the widow of Rao Balwant Singh, should upon her death be recorded in the names of her three grandsons and that the village of Harasana should be recorded in the name of Sultan Singh's wife. It was also not unnatural as regards the 250 bighas of land, which are mentioned in the judgment, which stood in the name of Bhagwan Kunwar that upon her death the widow of Sultan Singh should be recorded in the places of Bhagwan Kunwar. In joint Hindu families we constantly find that portions of joint estate are recorded in the names of widows of the family and also in the names of different members of it. Sultan Singh was not prejudiced by any act of the plaintiffs or by their acquiescence in the arrangement devised by Rao Balwant Singh for the management during his life of the joint family property. If a partition had been intended, it is strange that the movable property of the family was not included in the partition. It is also noticeable that some house property of the family was not dealt with in any way in the arrangement made by Rao Balwant Singh.

"There is another matter to which we should refer. The defendants set up the case that according to a custom of the family, the oldest son is entitled to a double share of the joint family. The only evidence in support of this contention are extracts from several *wajib-ul-arzes* in which it is stated that a son occupying the *gaddi* shall get a share more than any of his brothers. There is no force in this contention. The statement in these *wajib-ul-arzes* is merely the expression of the view of the proprietor for the time being and does not establish any such custom as is contended for. This matter was not seriously pressed in argument."

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"The conclusion at which we have arrived is that Rao Balwant Singh entrusted the management of the principal part of the immovable property to his sons with a view of getting rid of the burden of it during his life and purported by a will to regulate the devolution of the property after his death, thinking no doubt that his sons would acquiesce in any direction which he might during his life give in regard to the future enjoyment of the property. If the property had been self-acquired, his will would have been operative; but as has been found and this is not now a matter in dispute, the property is joint ancestral property and the will can have no operation."

On this appeal—

De Gruyther, K. C., and B. Dube for the appellants contended that the document of the 26th of November, 1895, was the record of a family arrangement made by Rao Balwant Singh on behalf of his sons under which the entire family property was as divided between them according to the custom of the family and by Hindu law. The respondents had consented to the partition, as was clearly shown on the evidence and by their conduct, after acquiescing in the arrangement and acting under it for more than 10 years they were now estopped from impeaching it as being unequal and invalid under Hindu law. A partition had been created of the family property and the respondents were not, it was submitted, entitled to the reliefs claimed in the suit. Reference was made to *Balakeshen Das v. Ram Narain Sahu* (1), *Parbati v. Naunihal Singh* (2) and *Raghunber Singh v. Moti Kunwar* (3). The custom under which the eldest son took a double share had been proved and the fact that he had been allotted a larger share than the other sons would not in any case defeat the family arrangement which had been made. [Mr. AMER ALI referred to *Umjad Ali Khan v. Mohumdee Begum* (4).]

The High Court had, it was contended, taken a wrong view of the object and intention of the deed of the 26th of November, 1895, which from its terms and the action taken under it was clearly meant to come into operation at once and was therefore not strictly speaking a "will," but that it was called a "will," made, it was submitted no alteration in its effect as a document creating a partition.

(1) (1903) I. L. R., 20 Cal., 738;
I. R., 30 I. A., 139.

(2) (1909) I. L. R., 31 All., 412

(421); I. R., 36 I. A., 71(70).

(4) (1867) 11 Moo., I. A., 517 (544).

(3) (1912) I. L. R., 35 All., 41.

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Arthur Grey and G. R. Lowndes for the respondents contend-
 ed that no valid or binding partition of the family properties or
 any part thereof had been made as alleged by the appellants.
 In any partition of the ancestral family properties the respondents
 were entitled in law to claim an equal division; Mayne's Hindu
 law, 7th edition, page 659, paragraph 488. The allocation of the
 various villages and lands purporting to have been made by or
 in accordance with the terms of the "will" amongst the members
 of the family was not intended to be and was not in fact a final
 partition of the said properties. The mutation proceedings did
 not constitute an estoppel on the respondents; if it was an admission
 it could be withdrawn as there was no obligation on them to
 make it: *Muhammad Imam Ali Khan v. Husain Khan* (1).
 There was no power in Rao Balwant Singh to make any disposi-
 tion of the ancestral properties and there was no consent to his
 doing so on the part of respondents, and none of them acquiesced
 in the division being a final one. Reference was made to *Jugo*
Bandhoo Tawaree v. Karan Singh (2) as to the nature of the
 assent required and to show that an admission on a point of law
 was not an admission of a "thing," so as to make it a matter
 of estoppel within the meaning of section 115 of the Evidence
 Act (I of 1872). *Jagwant Singh v. Silan Singh* (3) was
 referred to. There was no definite family agreement by which all
 the members would be bound: it was a scheme to give the eldest
 son a double share; and no custom to that effect had been proved.
 The case of *Umyad Ali Khan v. Mohumdee Begum* (4) was
 distinguishable from the present. The respondents, it was submit-
 ted, were entitled to the relief claimed and the High Court's deci-
 sion should be upheld.

De Greyther K. G. replied referring to and distinguishing the
 case of *Muhammad Imam Ali Khan v. Husain Khan* (1).
 1913, May 5th:—The judgment of their Lordships was
 delivered by Lord Moulton:—

This is a suit brought by two brothers, Rao Karan Singh
 and Kunwar Sheodan Singh (with whom are joined as plaintiffs
 (1) (1898) I. L. R., 26 Cal., 81 (100); (3) (1899) I. L. R., 21 All., 287.

I. R., 25 I. A., 161 (177).

(2) (1874) 22 W. R., 341 (345). — (4) (1867) 11 Moo., I. A., 517.

their respective sons Kunwar Shibray Singh and Kunwar Ranbir Singh), against the widow and son of their eldest brother Rao Sultan Singh, claiming a partition of certain properties which they allege to be the joint and undivided property of the family to which they belong, in which they are entitled to a two-thirds share. The defence is that the properties originally belonging to the family were the subject of a division by a family arrangement made and acted upon in 1895 during the life-time of the father of the plaintiffs, and that thenceforward the parties ceased to be held jointly, and that those properties of which the defendants are in possession came to them under that family arrangement and became and still remain their separate property.

The principal subject of dispute is village property. But the suit relates also to certain other property, as to which different considerations arise. It will be convenient in the first instance to determine the questions in issue so far as they relate to the village property only and to consider subsequently the effect of the facts thus found on the rights of the parties in respect to the other property.

It will be seen from the foregoing that the real issue in the case is whether or not the alleged family arrangement was in fact made and assented to by the parties interested. The defendants' contention in this respect is exceptionally clear and precise. It leaves no doubt as to the terms of the arrangement even in their minutest details, and is equally definite as to the date when and the circumstances under which it was made.

The father of the three brothers was Rao Balwant Singh. In 1895 he was the head of the family, which was then joint and undivided. The village property under his management, and to which this case relates, has been found by the court of first instance to have been ancestral property, and that finding is acquiesced in by the parties. He was at that date in advanced years and indifferent health, and determined to free himself from the labours of business and devote the remainder of his life to pilgrimages and travel in other countries. Accordingly, on the 26th of November, 1895, he drew up and executed a document (which he calls a will) setting out a division of the family property

among the members of the family, reserving nothing for himself. This is the family arrangement set up by the defendants. Their Lordships incline to the view that the term "will," as applied to this document, was a complete misnomer. It is manifest that it differed from a will in the crucial characteristics that it was intended to speak from the date at which it was written and not from a future date, viz. the death of the writer. It was, in fact, and was intended to be viewed as a record of a family arrangement then and there made and carried into effect partitioning the family estate among those interested. Indeed, in anticipation of this formal partitioning, the sons had been put into possession of their shares some two months previously. All this appears from the concluding passage of the document, which reads as follows:—

"All the three sons were put in separate possession of the estate in the beginning of the year 1303 Kasli (September 1895). I have no other heir having a right besides those mentioned in this will. I have therefore executed this will in order that it may serve as evidence."

There is no doubt whatever as to the authenticity or date of this document. But the property was ancestral and therefore Rao Balwant Singh, although head of the family, had no right to make a partition by will of that property among the various members of the family except with their consent. They had independent rights in it with which he could not interfere. The main question, therefore, is whether there is evidence sufficient to establish the consent of the plaintiffs Rao Karan Singh and Kunwar Sheo-dan Singh to this family arrangement. If they accepted it, their acceptance would bind not only them but also their sons, who are the remaining plaintiffs, as they would be representing in the transaction their respective branches of the family.

Their Lordships are of opinion that the evidence of their acceptance of the partition is overwhelming. To appreciate it fully it will be necessary to examine in some detail the contents of the document itself and the acts of the parties consequent thereon.

That the document testifies to a partition of the estate taking place then and there cannot be doubted. The sons were all adults at the time, and, before setting out the specific shares which each was to receive, the document reads thus:—

"My three sons are at present fully qualified to conduct the business. Therefore in order to avoid a dispute after my death I have at present, while in a sound state of body and mind and of my own free will and accord, divided the property among my sons, heirs, as follows."

"There follows a specific division of the villages by name among the three sons. It then gives certain *sw* lands and other property to his wife for life and proceeds to provide that at her death the *sw* lands (with the exception of that in the village of Badri) shall go to the wife of the eldest according to the custom of the family. The *sw* land in the village of Badri is to go to the wife of the plaintiff Kunwar Sheodan Singh, "because the share of Kunwar Sheodan Singh is less than that of Kunwar Karan Singh," the other plaintiff. The remainder of the property held by the wife for life is at her death to be divided among her three grand-sons. There are other minor details set out, but the above are the important provisions of the document and will suffice for the decision of the case.

This document was executed on the 26th of November, 1895. Early in 1896 the plaintiffs and their brother Rao Sultan Singh severally apply for mutation of names in respect of the villages allotted to them by their father in the document. It will suffice to refer to one of these applications, all of which *mutatis mutandis* are substantially identical. For this purpose the application of Kunwar Karan Singh in respect of the village Nagla Tula Ram may be taken. It is dated the 25th of February, 1896, and reads as follows:—

"Application for mutation of names in respect of 20 biswas of the zamindari property of the village of Nagla Tula Ram.

"The applicant begs to state as follows:—The applicant's father Rao Balwant Singh partitioned his property among his heirs under a registered will dated the 26th of November, 1895, and in accordance with the partition the 20 biswas of the villages of Bajpur and Nagla Tula Ram and 20 biswas of Khunpur a hamlet of Jirauli Mahai Rao Balwant Singh fell to the applicant's share. Therefore this application is filed and it is prayed that according to it the name of Rao Balwant Singh may be expunged in respect of the village of Nagla Tula Ram and the applicant's name entered in the khewat. Separate applications have been filed in respect of the remaining villages. The applicant's elder brother Rao Sultan Singh has filed the original will in a case relating to the village of Sahaul. It is also a proof in this case."

It will be well to follow up the proceeding thus initiated. On the 19th of March, 1896, we have the Tahsildar's record of the

hearing of the application and the order made thereon. It reads as follows :—

"Application for mutation of names in respect of 20 biswas of the village of Nagla Tula Ram, pargana Akraud, according to partition of the property.

"Kunwar Karan Singh, applicant, v. Rao Balwant Singh.

"Under a will, filed with the record of the mutation case relating to the village of Sahaoli, Rao Balwant Singh, a rais of Sahaoli, divided his zamindari property among his sons. The 20 biswa property of the village of Nagla Tula Ram, in respect of which the name of Rao Balwant Singh stands recorded without the participation of anyone else, has fallen to the share of Kunwar Karan Singh. Kunwar Karan Singh prays that his name may be entered in respect of the village aforesaid. Rao Balwant Singh verifies the application and prays for expungement of his name. In spite of the expiry of the time given in the notice, no objection has been taken. From the office report the property is found to be correct. The patwari of the village says that Kunwar Karan Singh made collections and assessments for kharrif of 1303 Fasil. As a transfer in possession has taken place, and no objection has been raised, the name of Rao Balwant Singh be expunged in respect of the village and the name of Kunwar Karan Singh entered in place of it. The record be submitted to the pargana officer for approval. A fee of Rs. 7 is deposited and the Treasury tender is filed with the record. No penalty is payable."

No more complete evidence that the family arrangement recorded in the so-called will was understood by all parties to be operative from the first and was acted on by them as such can be imagined than these two records, which are merely specimens of similar records relating to the other villages apportioned to the sons. It will be seen that the patwari of the village testifies to the applicants having made collections in 1303 Fasil (September 1895), thus confirming the truth of the statement in the so-called will that it was at that date that the sons entered into possession of the villages allotted to them. It should be added that direct evidence was given on behalf of the defendants that it was on that occasion that Rao Balwant Singh publicly announced his intention of making a partition of the property among the members of the family and gave the possession of the villages to the respective sons.

There is another set of transactions of a different date, which add strong confirmation to the defendants' case. Rao Sultan Singh died on the 30th of March, 1901, and his father, Rao Balwant Singh, died a few days later on the 7th of April, 1901. Thereupon there ensued a situation such that the conduct of the parties must evidence almost conclusively whether the property was regarded as belonging to an undivided family, or whether each son of Rao

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Balwant Singh held his portion separately. The importance of the situation is emphasized by the fact that the main grievance of the plaintiffs is that the share of the eldest brother is much larger than that of either of his brothers.

The conduct of the parties on this occasion was, in their Lordships' opinion, unambiguous and such as to show conclusively the truth of the defendants' contention. We find that application was made in July, 1901, by the widow of Rao Sultan Singh on behalf of her son Rao Brijraj Singh for mutation of names with regard to the property held by her late husband. The following is the record:—

"Amendment of khat."

"Rao Brijraj Singh, minor, under the guardianship of Musammamat Rani

Piari Kunwar.

"In the matter of the death of Rao Sultan Singh.

"Village of Sumera alias Bijaigarh, pargana Akraabad, the 17th July, 1901.

"To-day this case is put up in the presence of Kunwar Karan Singh and Kunwar Sheodan Singh and their statements have been taken down. They admit that the property aforesaid entered as holding No. 2 measuring 280 bighas stands recorded in the papers in the name of Rao Balwant Singh and that the same was declared to be in the share of Rao Sultan Singh under a will. Rao Sultan Singh is dead and his heir is Rao Brijraj Singh, whose name be entered. The pargana bears testimony to possession and others have taken no objection. It is

Ordered :

"That the name of Rao Balwant Singh be expunged in respect of holding No. 2 and the name of Rao Brijraj Singh be entered in papers and that the Sadar Munsharif do comply with the order."

There then follows the record of the statement made by Kunwar Karan Singh on that application. It reads as follows:—

"Present: Haji Muhammad Makhdum Husain, Settlement Deputy Collector at Aligarh.

"17th July 1901.

"Rao Brijraj Singh, minor, under the guardianship of Musammamat Rani Piari Kunwar in the matter of the death of Rao Sultan Singh.

"Village of Kumera (?) alias Bijaigarh.

"Statement of Kunwar Karan Singh.

"My father's name is Rao Balwant Singh, age thirty-three years, occupation zamindari, residence Sahauli, pargana Akraabad.

"Statement.

"Two hundred and eighty bighas entered as holding No. 2 stands recorded in the name of my ancestor, Rao Balwant Singh, and the same has, under a will, fallen to the share of my brother Rao Sultan Singh. Rao Sultan Singh is dead,

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and now his son Brijraj Singh is the owner. His name should be recorded and I have nothing to do with it.
"Signature of Kunwar Karan Singh."
And on the same day the statement of the other plaintiff, Kunwar Sheodan Singh:—
"Rao Brijraj Singh, minor under the guardianship of Musammam Rani Brijraj Singh, village of Rao Sultan Singh, village of Sumera alias Brijraj, pargana Akrahad.
"Statement of Kunwar Sheodan Singh, a rais of Baholi.
"Statement.
"My statement is the same as has been made by my brother Kunwar Karan Singh."

It is not necessary to go into the details of the mutation of names with respect to the six lands. They support the contention of the defendants in substantially the same way as that which has been already given with respect to the village property.

It is now necessary to examine the evidence put forward by the plaintiffs in answer to the case of the defendants, based, as it is on the unbroken evidence of ten years' conduct of all parties. In the first place the plaintiff Kunwar Karan Singh does not give evidence at all, so that his acts as shown by the records remain undenied and unexplained. The plaintiff Kunwar Sheodan Singh, however, gave evidence. He makes no attempt to deny any of the matters above referred to nor does he give any explanation why he took no action until the year 1905, i.e., four after the death of his father and brother and ten years after he had taken possession of his apportioned share. It is not too much to say that he did not attempt to show that there was a single fact known to him in 1905 when he instituted the suit which had not been known to him throughout. He makes it clear, however, that the family had lived in harmony till shortly before the suit was instituted, and lets it be seen that it was the pleaders whom he consulted who suggested that the claim made in this action should be set up. Taken as a whole his evidence leaves the defendants' case entirely unshaken.

The testimony mainly relied upon for the plaintiffs is that of Chiranjil Lal. He had been the general agent or factor of Rao Balwant Singh, and continued to transact the business in respect of the village properties for the sons after 1803 Fasal (September

1895). He was in a position to give most important evidence, for he must have known all the facts of the case, and if his evidence could be relied on, the fact that he gave evidence for the plaintiffs would have great weight. Unfortunately the very fact that he was in a position to know everything makes it impossible to accept his evidence as reliable. He was no more able to explain away the public acts of the plaintiffs to which reference has been made than could they themselves, and the contrast between his evidence and their conduct is enough of itself to throw the gravest doubt on the reliability of that evidence.

But an examination of his evidence shows in other ways that it is unreliable. Separate account books of the villages allotted to Sultan Singh were put to him by the defendants, and he admitted that they were in his own handwriting, and kept by him. One of these books contains the receipts of those villages, in the case of the year 1897. He admits that it contains a statement in his own handwriting that Sultan Singh is the proprietor of the property. He also admits that, so far as entries of expenditure are concerned, they relate only to the expenditure of Sultan Singh. Another relates to the year 1902. It contains the accounts of the same villages with a statement in his own handwriting that Brijaraj Singh is the proprietor and similarly the items of expenditure relate to him alone. It is true that he produced the falsity of the rest of his evidence. It is true that he produced collective account books for all the villages purporting to show that the property was enjoyed in common in spite of the partition. There are numerous discrepancies between these and the separate account books which he alleges were compiled from them, and he is wholly unable to account for these discrepancies or indeed for the existence of the separate account books at all. The learned Judge of first instance, who saw the witness and examined the books, came to the conclusion that these collective account books were not genuine, and their Lordships have no doubt that this conclusion was correct.

The claim of the plaintiffs in this action evidently arose from the suggestion of the pleaders whom they consulted after quarrels arose in the family, and was based on the fact that the document which evidences the partition is termed a will. It is obvious that

such a partition could not have been made by Balwant Singh by will strictly so-called. But, as has been already pointed out, the document is much more than a will (if indeed it is in any sense a will at all), for it describes and witnesses to a family arrangement contemporaneously made and acted on by all parties. Everyone treated it as such at the time. The mutations of names show this beyond controversy. There is nothing, therefore, in the fact that the document is called a will which invalidates the partition, which was undoubtedly made in fact, and which was acted on by all parties for ten years without any dispute or misunderstanding as to their respective rights under it.

Counsel for the plaintiffs have endeavoured to support the contention that the partition was not intended to take effect *in present*; by reference to a provision to be found in this document. It reads as follows:—

"If I at any time come back from pilgrimages and find mismanagement or character of any one bad, then I shall have power to cancel this will, which shall be enforced from the date of its execution."

Their Lordships are of opinion that the highest effect that can be given to such words is that this evidences a contractual condition which the sons accepted in order to obtain the partition which gave them immediate possession of the property, and viewed thus, the contractual acceptance of a power of forfeiture in case of bad behaviour would not, in their Lordships' opinion, be sufficient to prevent the partition operating *in present*. But the true interpretation of the provision is probably that it was merely put in as a threat in order to keep the sons in good behaviour, and that it could not have been enforced specifically, or even at all. It is certainly quite insufficient to outweigh the overwhelming evidence that this was a family arrangement accepted by all parties.

The above considerations relate only to the village property. In addition to this there were two buildings, one in Allgarh and the other at Sahaoli. The disposition in the document relating to these buildings is peculiar and did not in the opinion of the learned Judge of first instance amount to an absolute disposition of them, and their Lordships are not prepared to differ from his views on this point.

There remains the movable property. As to this the family arrangement is absolutely silent. The plaintiffs are therefore

entitled to their share of these movables as inherited pro-

erty.

It will be seen therefore that their Lordships are of opinion

that the judgment of the learned Judge of first instance was

right on all points. Both plaintiffs and defendants appealed from

his decision to the High Court. That Court allowed the plaintiffs'

appeal and dismissed that of the defendants. The defendants

appealed from both of these decisions. In their Lordships' opinion

the High Court ought to have dismissed both appeals. They will

accordingly humbly advise His Majesty that the order of the High

Court allowing the plaintiffs' appeal should be discharged with

costs, and the decree of the Subordinate Judge restored, and that

the order of the High Court dismissing the defendants' appeal

should be affirmed. The plaintiffs must pay the costs of the

defendants' appeal to His Majesty in Council, and the defendants

must pay the costs of their unsuccessful appeal.

Solicitors for the appellants:—*Ranken, Ford, Ford and*

Chester.

Solicitors for the respondents:—*Barrow, Rogers and Newl.*

J. V. W.

APPELLATE CIVIL.

Before Mr. Justice Sir Harry Giffin and Mr. Justice Channier.

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BAKSHI RAM (DEFEENDANT) v. LILAHAR AND OTHERS (PLAINTIFFS).

Mortgage—Suit for sale against auction purchaser of mortgaged property—

Evidence, admissibility of—Recital of receipt of consideration—Estoppel.

Held that an admission made by a mortgagor in a mortgage deed and also

before the registering officer as to the receipt of consideration is admissible in

evidence against the purchaser of the mortgaged property at an auction sale in

execution of a simple money decree. *Bihari Lal v. Mahdum Baksh* (1) followed.

Manohar Singh v. Sumritia Kuar (2) not followed. *Mahomed Mozuffar Hossain*

v. Kishor Mohun Roy (3) referred to.

Held also that a purchaser at auction of the right, title and interest of the

father alone in joint family property which had been mortgaged by the father

was not entitled to raise the plea that the mortgage was made without legal

* Second Appeal No. 874 of 1912 from a decree of J. L. Johnston, Second

Additional Judge of Allahabad, dated the 28th of March, 1912, modifying a decree of

Kunwar Sen, Additional Subordinate Judge of Allahabad, dated the 30th of

May, 1911.

(1) (1913) I. L. R., 55 All., 194.

(2) (1895) I. L. R., 17 All., 428.

(3) [(1896) I. L. R., 22, Cal., 909.

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necessity so long as there was yet time for the sons to challenge the purchase. *Muhammad Muzamil-ullah Khan v. Mitlu Lal* (1) distinguished.

The facts of this case were as follows:—

The suit was brought on the basis of three mortgage deeds, of which one only was the subject of dispute when the case came in

second appeal before the High Court. This was a mortgage executed by Kallu, on the 15th of March, 1890, in favour of the respondents. The appellant was the purchaser of the equity of redemption at an auction sale held on the 20th of January, 1909, in execution of a simple money decree against Kallu alone. Kallu and his sons and the appellant were made defendants in the suit. The appellant alone contested it. He questioned the execution and the payment of consideration, and stated that Kallu had no necessity to borrow at all. The plaintiffs examined only one

attesting witness to the deed in question and he deposed that the mark of the executant Kallu had not been made in his presence. The court of first instance held the execution and part of the consideration proved and allowed the claim to that extent. On appeal the District Judge decreed the claim in full, holding that the recital of receipt of consideration in the bond and the registration endorsement were sufficient evidence, which was un rebutted, against the appellant. As to the plea of want of legal necessity the District Judge refused to entertain it, on the ground that the

plea had not been specifically raised in the court of first instance, which had framed no issue regarding it. The defendant appealed. Dr. Satish Chandra Banerji (for Babu Durga Charan Banerji), for the appellant:—

The plaintiffs have not proved that the bond was properly

attested within the meaning of section 59 of the Transfer of

Property Act. There is no mortgage; *Shamu Patter v. Abdul*

Kadir Ravuthan (2). Secondly, the recital in the bond is not

binding upon the appellant who is an auction purchaser; *Manohar*

Singh v. Sumrita Kuar, (3) *Bishneswar Dayal v. Harbars Sahay*

(4). In the recent case of *Bihari Lal v. Malchidum Bakhsh* (5) the

case of an auction-purchaser was left open. There the purchaser

was one who had obtained a private transfer. It has been held in

(1) (1911) I. L. R., 38 All., 783. (3) (1895) I. L. R., 17 All., 428.

(2) (1912) I. L. R., 35 Mad., 607. (4) (1907) 6 C. L. J., 659.

(5) (1913) I. L. R., 35 All., 194.

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some cases that an estoppel which is operative against the judgment-debtor need not necessarily be operative against the auction-purchaser; *Mahomed Mozuffer Hossain v. Kishore Mohun Roy* (1). Thirdly, the District Judge should have entertained the plea of want of legal necessity. The plea was raised in the written statement. A purchaser is entitled to raise the plea; *Muhammad Musammi-ullah Khan v. Mitlu Lal* (2).
Babu Sarat Chandra Chaudhri (for Babu Jogindro Nath Chaudhri), for the respondents, was heard on the first and the third points:—

The case was decided by the two lower courts previous to the publication of the ruling of the Privy Council cited by the appellant. According to the view which prevailed before that ruling the bond in dispute would be regarded as validly attested and sufficiently proved, as the materials now stand on the record. Under the circumstances an opportunity ought to be given to the respondents to produce the other attesting witnesses and prove the document in the light of that ruling.

Then, the appellant is the auction purchaser of Kallu's interest alone and not of that of the sons. His position is no higher than that of Kallu, and he can not raise any pleas not permissible to Kallu himself. Therefore, he is not entitled to raise the question of want of legal necessity. In the case in I. L. R., 33 All., relied on by the appellant, the purchaser, besides being a transferee from the mortgagor alone, had acquired by adverse possession a title to the whole of the family property as against all the members of the family. In the present case the appellant has acquired nothing beyond Kallu's interest.

Dr. Satish Chandra Banerji, in reply:—On a sale in execution of a simple money decree against the father alone it is not only the interest of the father that can pass, but the whole family property including the sons' interest can pass, unless the sons prove that the debt was tainted with immorality. In the absence of any such action on the sons' part it must be taken that the appellant purchased the whole family property and is thus entitled to raise the plea of legal necessity.

GRiffin and CHAMBER, JJ:—This was a suit by the respondents on three mortgages, dated the 18th of August, 1878, the 15th of (1) (1895) I. L. R., 22 Calo., 909. (2) (1911) I. L. R., 33 All., 788.

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March, 1890, and 13th of November, 1898, but for the purposes of the present appeal we may regard it as a suit on the mortgage of the 15th of March, 1890, only. The first defendant to the suit was Kallu, the executant of the mortgage. Defendants 2, 3 and 4 were the sons of Kallu. Defendant 5 was a lessee of the mortgaged property, and defendant 6, who is the appellant here, is a purchaser of the property in execution of a money decree obtained by him against the defendant Kallu. The appellant put the respondents to proof of the mortgage and of the passing of the consideration and he also pleaded that the mortgage had been made without necessity. The first court held that the execution of the mortgage was proved by the evidence of two witnesses Raghunath Prasad and Bhudeo, but that the passing of a portion of the consideration had not been proved. That court accordingly gave the respondent a decree for part only of the sum secured by the mortgage. On appeal the District Judge agreed with the court of first instance that the execution of the mortgage had been proved and held that it was not open to the present appellant to challenge the deed on the ground that it was not supported by necessity. On the evidence he came to the conclusion that the passing of the whole of the consideration for the deed had been proved and he varied the decree of the first court accordingly. In second appeal it is contended:—(1) that the District Judge was wrong in holding that an admission as to the receipt of the consideration made by the executant Kallu in the deed and again before the registering officer was admissible in evidence against the appellant, the auction-purchaser of the property, (2) that the appellant was entitled to raise the question of legal necessity, and (3) that the evidence of law amount to proof of the execution of the deed did not as a matter of law amount to proof of the execution of the deed made by Kallu. The question whether admissions such as those made by Kallu in the present case are admissible against a subsequent auction-purchaser of the property was left open by our decision in *Bihari Lal v. Malhdum Balish* (1). All that was held in that case was that such admissions are admissible against a subsequent purchaser of the property by a private treaty. But on the authorities we must hold that there is no real ground for distinguishing between

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the case of an auction-purchaser and the case of a purchaser by private treaty. The decision of this Court in *Manohar Singh v. Sumritia Kuar* (1) has been relied on as authority for the proposition that such admissions are not admissible against a subsequent auction-purchaser of the property. The decision in that case was pronounced shortly before the decision of their Lordships of the Privy Council, in *Mahomed Mozuffer Hossein v. Kishor Mohun Roy* (2) was received in this country. In that case their Lordships said that "where one man allows another to hold himself out as the owner of an estate and a third person purchases it for value from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title unless he can overthrow that of the purchaser by showing either that he had direct notice or at least constructive notice of the real title" and their Lordships decided that this rule applied to a subsequent auction-purchaser of the property. Their Lordships said:—"This principle applies to Abdul Ali, and the appellants are in the same position, as they purchased only his right, title and interest and are equally bound by it." If such an estoppel is binding upon a subsequent auction-purchaser, there can be no doubt that an admission made with reference to property is admissible in evidence against a subsequent auction-purchaser of the property. The value of the admission is another matter. The appellant in the present case must be held to be the representative in interest of Kallu and the statements made by Kallu in the deed and before the registering officer are therefore admissible against him. If there is no ground for distinguishing between the case of an auction-purchaser and the case of a purchaser by private treaty, there can be no doubt of the admissibility in evidence of the statements made by Kallu. On this point there are several recent decisions of this Court. The first ground of appeal, therefore, fails.

With regard to the second ground of appeal, the appellant must be regarded as a purchaser of the rights of Kallu only. His purchase was made as recently as 1909 and might yet be challenged by Kallu's son. He is, therefore, in a different position (1) (1895) I. L. R., 17 All. 428. (2) (1895) I. L. R., 22 Calo., 909.

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from that occupied by the purchaser in the case of *Muhammad Musamill-ullah Khan v. Mitthu Lal* (1). In that case it was held by the majority of the Court that the purchaser was entitled to challenge a mortgage made by one member of a Hindu family, because he had acquired title to the property, by adverse possession against all the members. We must, therefore, hold that the appellant is not entitled to raise the question of the validity of the mortgage. With regard to the third ground of appeal we think there ought to be a further inquiry by the lower appellate Court. It appears that there were three supposed attesting witnesses to the mortgage. One named Raghunath Prasad, who was called, said that Kalu did not sign the deed in his presence, therefore, he was not an attesting witness. There is evidence that another supposed attesting witness named Sundar Lal is dead. Nothing is known about the third attesting witness. The respondent in all probability relied on a decision of this Court according to which the evidence of Raghunath Prasad, if believed, was sufficient evidence of the execution. In view of a recent decision of the Privy Council it must be held on the record as it stands that the bond in suit has not been proved. In the circumstances we think that the respondent should be given a further opportunity of producing evidence. We direct that the record be returned to the court below for a fresh finding on the question whether the mortgage deed of the 15th of March, 1890, has been proved. Further evidence will be taken; and on return of the finding ten days will be allowed for objections. *Issue remitted.*

APPELLATE CRIMINAL.

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Before Mr. Justice Sir Harry Griffin and Mr. Justice Channier.
EMPHEROR v. ATLAHAD KHAH.*

Act (Local) No. IV of 1910 (United Provinces Excise Act), section 63—Criminal Procedure Code, section 537—Unlawful possession of excisable article—Search warrant—Conviction not invalidated owing to absence of warrant. Where the superintendent of police and a sub-inspector searched the house of a person suspected of being in illicit possession of excisable articles and such

* Criminal Appeal No. 123 of 1913 by the Local Government, from an order of R. O. Tute, additional Sessions Judge of Meerut, dated the 30th of November, 1912.

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articles were found in the house searched, it was held that the conviction of the owner of the house under section 63 of the United Provinces Excise Act, 1910, was not rendered invalid by the fact that no warrant had been issued for the search, although it was presumably the intention of the Legislature that in a case under section 63, where it was necessary to search a house, a search warrant should be obtained beforehand.

In this case the house of one Allahdad Khan was searched by the superintendent of police and a sub-inspector on suspicion that the owner was in illicit possession of excisable articles within the meaning of section 63 of the United Provinces Excise Act, 1910, and a mixture of cocaine with another drug was found in it. No search warrant had been obtained for the search. The finding of the cocaine was established by evidence and the accused was convicted under the Excise Act. On appeal the Sessions Judge held that the search was illegal and that the illegality vitiated the proceedings, and he acquitted the accused. The Local Government appealed.

The Government Advocate (Mr. A. E. Ryves), for the Crown :—
The police officers who conducted the search had a right to do so without a search warrant. Section 50 of the United Provinces Excise Act (IV of 1910) authorized them to do so. They had authority to make the search also under the provisions of the Criminal Procedure Code. Secondly, the irregularity in conducting the search is covered by the provisions of section 537 of the Code of Criminal Procedure. The words, "other proceedings before or during trial" in clause (a) of that section cover the case. Thirdly, an irregular search does not vitiate the trial and render the conviction illegal. It does not affect the question whether the accused was guilty or not. If the facts found establish his guilt the conviction is perfectly legal.

Mr. *Hammed-ullah*, for the accused :—

Section 50 of the Excise Act provides for immediate action only in urgent cases. This appears to have been intended from a consideration of the words "found committing an act &c." in that section and of the succeeding sections 51, 53 and 54. If there is time to get out a search-warrant then a warrant should be obtained. In the present case there was ample time to get out a warrant. Section 537 is not meant to cure erroneous or illegal proceedings of the police but only of courts.

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GRIFFIN and CHAMBER JJ:—One Allahad Khan was convicted of an offence punishable under section 63 of the United Provinces Excise Act, No. IV of 1910, which provides as follows:—

"Whoever, without lawful authority, has in his possession any quantity of any excisable article knowing the same to have been unlawfully imported, transported or manufactured, and knowing the prescribed duty not to have been paid thereon, shall be punished with imprisonment for a term which may extend to three months or with fine which may extend to one thousand rupees or with both."

The Superintendent of Police and the Sub-Inspector in charge of the city police station, on information received, searched the house of Allahad Khan and discovered there a mixture of cocaine and another drug. The accused was convicted by a magistrate and sentenced to six weeks' rigorous imprisonment and a fine of Rs. 50. On appeal the Additional Sessions Judge held that the search of the accused's house was illegal and that the absence of a search warrant was fatal to the case for the prosecution. He therefore acquitted the accused. The Local Government has appealed against the order of acquittal. It is doubtful whether the case is one which comes under the provisions of section 50 of the Excise Act, and we would have some hesitation in holding that the search was legal. Whether the search was legal or not, we have, however, the evidence of the finding in the accused's house of a certain quantity of cocaine, which is an excisable article under the provisions of the Excise Act, for possession of which the accused had no licence. On the facts found we are satisfied that the accused must have known that the cocaine had been unlawfully imported and that no duty had been paid on it. We allow the appeal, set aside the order of acquittal passed by the Additional Sessions Judge and restore the order of conviction. We reduce the sentence passed on the accused to the term of imprisonment already undergone by him and we set aside the order of fine. We may add that we think that it was the intention of the Legislature that in a case under section 63, where it is necessary to search a house, a search warrant should be obtained beforehand.

Appeal allowed and sentence reduced.

REVISIONAL CRIMINAL.

Before Mr. Justice Muhammad Rafiq.

EMPEROR v. BIMALA CHARAN ROY.*

Act No. XLV of 1860 (Indian Penal Code), sections 408 and 408—Criminal breach of trust—Water works inspector misappropriating water—Money realized as water tax not credited to the municipality

Where a municipal water works inspector, being the lessor of a house within municipal limits which he had sub-let, had such house connected with a municipal water main and accepted a yearly payment as water tax from his tenants, but neither informed the municipal board that the connection had been made nor credited to the board the money which he received as water tax from his tenants, it was held that he was properly convicted under sections 406 and 408 of the Indian Penal Code, whether or not he might have been punishable under the United Provinces Water Works Act, 1891.

The facts of this case were as follows:—

One Bimala Charan Roy was a water-works inspector in the service of the municipality of Cawnpore on Rs. 140 per mensem. He rented two houses situated in one compound No. 27 in mohalla Patkapur in the city of Cawnpore. He himself lived in the larger house and let the other house to two brothers Surendra Nath and Birendra Nath Banerji at a rent of Rs. 3 per mensem. Water was laid on to the larger house, but not to the smaller one. The tenants of the smaller house wanted the water to be laid on to their house and applied to the municipality. The latter tapped the principal main which ran on the side of the compound No. 27 and connected it by means of an old pipe to the smaller house and to the garden on the wall. This work was done under the orders of the engineer by the municipality. No report of the work was made to the municipality. The work was represented to the tenants that the municipality had laid the pipes, namely, one to the smaller house and the other to the garden, came to Rs. 3, and that he and they, the tenants, should pay the tax in equal shares. The municipality of the city of the applicant and told him that he and his brother should in 1911 the applicant was elected member of the municipality or left their service. It was also the intention of the municipality with the municipality that it was discovered that water was

on to the smaller house and the garden for which no tax had been paid to the municipality. After a careful investigation a prosecution was started against the applicant which resulted in his conviction under sections 406 and 408 of the Indian Penal Code, and on appeal his conviction and sentence were upheld by the Sessions Judge. Binola Charan Roy applied in revision to the High Court. Mr. W. Wallach, Babu Satya Chandra Mukerji and Babu Sudh Prasad (those for the applicant.

The Assistant Government Advocate (Mr. R. Malcomson), for the Crown.

MUNAKMAD KARIG J.—This is an application in revision under section 435 of the Criminal Procedure Code from an appellate order of the learned Sessions Judge of Cawnpore maintaining the convictions and sentences passed on the applicant under sections 406 and 408 of the Indian Penal Code. The facts which led to the conviction of the appellant are as follows. The applicant Binola Charan Roy was the water-works inspector in the service of the municipality of Cawnpore on Rs. 140 per mensem. He rented two houses situated in one compound No. 57 in mohalla Parkapur in the city of Cawnpore. He himself lived in the larger house and let the other house to two brothers Surendra Nath and Birendra Nath Banerji at a rent of Rs. 3 per mensem. It seems that water was laid on to the larger house but not to the smaller one. The tenants of the smaller house wanted the water to be laid on to their house and spoke about it to the applicant. The latter tapped the principal main which ran on the east side of the compound No. 57 and connected it by means of an old pipe to the smaller house and to his garden on the west. The work was done under the orders of the applicant by the plumbers and fitters of the municipality, who were his subordinates. No report of the new connection was made to the municipality. The applicant represented to his tenants that the municipal tax for the two pipes, namely one in the smaller house, and the other in the garden, came to Rs. 9, and that he and they, the tenants, should pay the tax in equal shares. The tenants agreed to the proposal of the applicant and paid him Rs. 9 for two years. Some time in 1911 the applicant was either dismissed by the municipality or left their service. It was after the severance of his connection

with the municipality that it was discovered that water was being
on to the smaller house and the garden, for which no water had
been paid to the municipality. After a careful investigation
prosecution was started against the neighbor who was
his conviction. The facts just related have been found by the
two lower courts against the applicant. The learned court
for the applicant has advanced two contentions in support of the
applicant that the offense derivable from the facts found by the
lower courts is one that falls under section 43 of the Penal Code,
Act, or one of them, or cheating. No offense under section 408
or 408 of the Indian Penal Code, it is said, has been made out.
I do not agree with the contention of the learned court of the
applicant. The applicant was a member of the municipality of
Cawnpore and one of his duties was to superintend and control the
distribution of water from the municipal water-works. In other
words he had dominion over the water belonging to the municipality.
He deliberately misappropriated that water for his own
use and for the use of his tenants, for which he paid no rate and
about which he had no information to his employers, not a claim of
permission for tapping the main. In thus misappropriating
municipal water the applicant clearly committed the offense
described in section 408 of the Indian Penal Code. The offense
of the applicant in realizing money from his tenants on account
of water tax and misappropriating that money to himself, falls
under the offense described in section 406 of the Indian
Penal Code. There was a distinct contract between the applicant
his tenants that the money which the latter were to pay was to be
paid on account of water tax, and the applicant was bound to
money committed criminal breach of trust. It is not possible to
offences of applicant may be punishable under section 406 of the
Act also, but that does not vitiate the conviction under section 408
406 and 408 of the Indian Penal Code.

The second point urged on his behalf
force is that he being a literate person
been dealt with so severely.
The learned counsel for the applicant
his client for the reduction of the
because the applicant is a

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Application rejected.

sovereignly than an ignorant man. In fact his position as a servant of the municipality and as a literate person calls for a more severe sentence than if he were an ignorant man unconnected with the municipality. The application fails and is rejected. The applicant must surrender to his bail before the Magistrate.

Before Mr. Justice Sir Harry Griffin and Mr. Justice Channar.
GOBARDHAN DAS AND OTHERS (DEFENDANTS) v. HORI LAL (PLAINTIFF) AND LEKHA SINGH AND OTHERS (DEFENDANTS).*

Act No I of 1872 (Indian Evidence Act), sections 69 and 70—Evidence—Mortgage—Proof of execution of mortgage—Mortgagors illiterate, and both they and the attesting witnesses dead before suit brought.

A mortgage deed was on the face of it executed in 1889 by three illiterate mortgagors, who affixed their marks, and was attested by more than two witnesses. At the time of the institution of a suit for sale thereon, all the executants and the attesting witnesses were dead, and the evidence tendered in proof of the mortgage consisted of (1) the statement of a witness who professed to be acquainted with the handwriting of two of the attesting witnesses, (2) a deed of usufructuary mortgage executed by one of the executants of the mortgage in suit and by the representative of the two other executants, which referred to and recognized the genuineness of the mortgages in suit, and (3) a deed of sale executed in 1903 by the representatives or some of the representatives of the executants of the deed in suit, which recognized the genuineness of the usufructuary mortgages mentioned above.

Held that, having regard to sections 69 and 70 of the Indian Evidence Act, 1872, this evidence was not sufficient to prove the mortgage in suit.

This was suit for sale on a mortgage purporting to be executed in 1889 by three persons—Khushal Singh, Moti Singh and Baljit Singh. The executants, being illiterate, had merely made their marks on the document. The deed was also attested by several witnesses. At the time of suit all the executants and the attesting witnesses were dead, and the evidence tendered in proof of the mortgage consisted of (1) the statement of a witness who professed to be acquainted with the handwriting of two of the attesting witnesses, (2) a deed of usufructuary mortgage executed by one of the executants of the mortgage in suit and by the representative of the two other executants, which referred to and

* Second Appeal No. 846 of 1912, from a decree of R. E. Taylor, District Judge of Bareilly, dated the 14th of March, 1912, confirming a decree of Baijnath Das, Officiating Subordinate Judge of Bareilly, dated the 8th of May, 1911.

recognized the genuineness of the mortgage in suit, and (3) a deed of sale executed in 1902 by the representatives or some of the representatives of the executants of the deed in suit, which recognized the genuineness of the usufructuary mortgage mentioned above. Both the courts below accepted this evidence as sufficient to prove the mortgage and gave the plaintiff a decree accordingly. Some of the defendants appealed to the High Court and contended that the lower court was wrong in holding that execution of the mortgage in suit had been proved within the meaning of section 69 of the Indian Evidence Act, 1872.

Babu Lalit Mohan Banerji, for the appellants:—

The mortgage-deed in suit has not been proved as required by section 68 and section 69 of the Evidence Act. There is no proof that the signatures of the executants are in their handwriting. The provisions of section 69 are imperative and are not satisfied by proving a later deed of usufructuary mortgage in which the deed in suit has been recited. Secondly, some of the representatives in interest of the executants of the deed in suit did not join in executing the usufructuary mortgage or the sale deed. They are, therefore, not bound by any admissions contained in those two documents.

Mr. B. E. O'Connor, for the respondents:—

The plaintiff produced the best evidence that could possibly be given under the circumstances in proof of the mortgage in suit. Section 69 does not say that direct evidence alone must be given in proof of the signature of the executant. Where direct evidence is not available, the execution may be proved by indirect evidence. Accordingly, proof of the later deed which recites the deed in suit is sufficient proof of the latter. The Indian law of evidence is founded on the English law. Section 69 should, therefore, be supplemented by the English rules of evidence which provide that in cases like the present the document can be proved by secondary evidence of handwriting, or by presumption or by any other evidence; *Phypson: Evidence* (5th Edition), page 494, *Taylor. Evidence* (9th Edition), page 1214.

Babu Lalit Mohan Banerji, was not heard in reply.

GRIFFIN and CHAMBER, JJ:—This appeal arises out of a suit brought by the respondent Hori Tal on a mortgage made in his

favour on the 22nd of November, 1889, by three persons, Khushal Singh, Moti Singh and Baljit Singh. Both the courts below have found that the mortgage in suit has been proved and have decreed the claim. This is a second appeal by some of the defendants, who contend, and have throughout contended, that the mortgage deed has not been proved. Other points are taken in the appeal to this Court. But, in the view we take of the question of the proof of the deed in suit, it is unnecessary to refer to them. The three executors of the deed, being unable to write, made their marks. All three of them and all the attesting witnesses to the deed died before this suit was brought. The evidence adduced to prove the document consists of (1) the statement of a witness named Lalta Prasad, who claimed to be acquainted with the hand-writing of two of the attesting witnesses, (2) a deed of usufructuary mortgage executed by one of the executors of the mortgage in suit and by the representative of the two other executors, which refers to and recognizes the genuineness of the mortgage in suit, and (3) a deed of sale executed in 1902 by the representatives or some of the representatives of the executors of the deed in suit, which recognizes the genuineness of the usufructuary mortgage mentioned above. This evidence leaves little doubt in our mind that the mortgage in suit is genuine, and it has been accepted by both the courts below as sufficient. But it is contended that the evidence, other than the statement of the witness Lalta Prasad, is not evidence of the kind required by law. The appellants rely on section 69 of the Evidence Act, which provides that "if no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness, at least, is in his hand-writing, and that the signature of the person executing the document is in the hand-writing of that person." The evidence of Lalta Prasad proves that the attestation of two of the attesting witnesses is in their hand-writing. But it appears to us that the two deeds relied upon are not evidence that the signatures of the persons executing the document are in their hand-writing. It was contended on behalf of the plaintiff respondent that the usufructuary mortgage and the deed of sale prove indirectly that the signatures of the three executors are

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Before Sir Henry Richards, Knight, Chief Justice, and Mr Justice Banerji.
 BASANT BIHARI GHOSHAL (PETITIONER) v. THE SECRETARY OF
 STATE FOR INDIA IN COUNCIL. (OPPOSITE PARTY).*

Civil Procedure Code (1908), order XX, rule 2.—Judgment—Judgment written
 by the Judge who heard the case after his transfer from the division and pro-
 nounced by his successor in office.

A Judge may pronounce a judgment written but not pronounced by his pre-
 decessor in office, and this notwithstanding that at the time the judgment was
 written the Judge who wrote it had ceased to be the Judge of the court in which
 the case was tried. *Satyendra Nath Ray Chaudhuri v. Kastura Kumari*
Chatterjee (1) followed.

This was a claim for compensation under the Land Acquisition
 Act. The claimant had been allowed Rs. 7,900 out of a much larger
 sum demanded and appealed as to the balance. The only point
 in the case material for the purposes of this report was that the
 judgment had been written by the Judge who tried the case after
 he had made over charge as Judge of the particular judicial division,
 and was pronounced by his successor in office. On these grounds
 it was contended in appeal that the judgment was invalid.

Dr. *Sutish Chandra Banerji*, for the appellant.
 Mr. A. E. *Ryves*, for the respondent.

RICHARDS, C. J. and BANERJI, J.—This appeal arises out of a
 suit under the Land Acquisition Act. The property in respect of
 which the claim arises is situate in Allahabad, not far from the
 Muir Central College, for which institution it was acquired. The
 appellant has been awarded the sum of Rs. 7,900. In his appeal
 he claims a further sum of Rs. 32,000. There can be no doubt that
 if the appellant was the absolute owner of the property in dispute
 or even if he had a permanent interest therein subject only to the
 payment of Rs. 48-8-0 per annum to Government, he would be
 entitled to a considerably larger sum than has been awarded to
 him by the court below. We have considered the evidence, and we
 entirely agree with the court below that the appellant has not shown
 that he had any permanent interest in the plot. In our opinion his
 tenure amounted to no more than a tenancy from year to year.

We have been referred to *Naba Kumar Deb v. Behari Lal Sen* (2), *Nanda Lal Goswami v. Atarnani Dasee* (3),

* First Appeal No. 888 of 1911 from decree of R. C. Tute, officiating District
 Judge of Allahabad, dated the 9th of September, 1911.

(1) (1908) I. L. R., 35 Cal., 756. (2) (1907) I. L. R., 34 Cal., 302.
 (3) (1908) I. L. R., 35 Cal., 763.

Upendra Krishna Mandal v. Ismail Khan Mahomed (1) and *Nilratam Mandal v. Ismail Khan Mahomed* (2). All these cases were decided upon their own facts and circumstances and are quite different from the present case.

In the view we take of the nature of the appellant's tenure, we cannot say that the compensation awarded him by the court below was erroneous. It has been contended that the judgment of the court below and the decree founded thereon are bad because the judgment was written by Mr. Tute after he had ceased to be the District Judge of Allahabad. The judgment, no doubt, was so written and it was delivered by his successor. We think the mere fact that Mr. Tute had ceased to be the District Judge, when he wrote the judgment, is not sufficient to vitiate the judgment. Order XX, rule 2, provides that a Judge may pronounce a judgment written but not pronounced by his predecessor. In the Full Bench case of *Satyendra Nath Ray Chaudhuri v. Kastura Kumari Ghatwain* (3) the Calcutta High Court held that a judgment written ten months after the Judge had ceased to have jurisdiction in the particular division was good and fulfilled the conditions of the corresponding section of the Code of Civil Procedure then in force. It has been further argued that the award is without jurisdiction because Government claimed an interest in the property as well as the appellant. We do not think that there is any force in this contention. It can hardly be said that if land was in the occupation of a lessee under a lease from Government for fifty years, ten years of which had expired when the property was wanted for some public purpose, the property could not be acquired upon payment of compensation to the lessee for his interest in the unexpired term. If this be so, there is no difference in principle in the present case. If the appellant's interest is that of a tenant from year to year, he is entitled to compensation for the period that could elapse before he could be turned out and also for reasonable compensation for the buildings which are situate on the land.

In our opinion the appeal fails, and we accordingly dismiss it with costs.

Appeal dismissed.

- (1) (1904) I. L. R., 32 Calo., 41. (2) (1904) I. L. R., 32 Calo., 51. (3) (1908) I. L. R., 35 Calo., 756.

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April, 1.

Before Mr. Justice Sir Harry Griffin and Mr. Justice Ryves.

WALIDAD KHAN AND OTHERS (PLAINTIFFS) v. JANAK SINGH

(DEFENDANT).*

Act No. IX of 1872 (Indian Contract Act), section 11—Minor—Sale—Minor vendee subsequently disposed by third party—Right of vendee to recover purchase money from vendor.

Where certain zamindari property was sold to persons who were minors at the time of sale, and the purchasers were subsequently ousted on suit by third parties, it was held that the purchasers were at any rate entitled to recover from the vendors the sum which they had paid as purchase money. *Mir Sarwarjan v. Rukhruddin Mahomed Chowdhuri* (1) and *Mohori Bibee v. Dharmodas Ghose* (2) distinguished.

THE facts of this case were as follows:—

The respondent sold certain zamindari property to the plaintiffs appellants and received Rs. 800, the sale price. The vendees were minors at the time. At the date of the sale, the respondent had no subsisting title to the property. The true owners of the property brought a suit for cancellation of the sale deed and for recovery of possession. The suit was decreed, and the property thus passed out of the plaintiffs' possession. The plaintiffs then brought the present suit against the respondent for refund, "under the terms of the sale-deed and also under the law," of Rs. 800, together with interest, and for the costs incurred by them in defending the former suit. The Munsif decreed the suit in full, except for a reduction of the amount claimed as interest. On appeal the District Judge, holding that the sale transaction was void on account of the vendees' minority, dismissed the suit entirely. The plaintiffs appealed to the High Court.

Dr. Surendra Nath Sen, for the appellants:—

The lower appellate court has dismissed the suit on the authority of the ruling in *Mir Sarwarjan v. Rukhruddin Mahomed Chowdhuri* (1). That case is distinguishable. There, the suit was for specific performance of the contract to sell. Here the sale had taken place, consideration had passed and possession had been delivered. The contract has been executed and the matter has passed beyond the domain of mere agreement. There is a fundamental distinction between a contract and a conveyance, and the

* Second Appeal No. 764 of 1912 from a decree of H. B. L. P. Duponnet, District Judge of Farrukhabad, dated the 15th of March, 1912, reversing a decree of Jotindra Mohan Basu, Munsif, dated the 2nd of September, 1911.
(1) (1911) 9 A.L.J. 33; L.R., 39 (2) (1903) L.L.R., 30 Cal., 539.
I.A., 1; L.L.R., 39 Cal., 232.

rights of parties to the two transactions are quite different; *Rashik Lal v. Ram Narain* (1). A transfer in favour of a minor was upheld in the case of *Meghan Dube v. Pran Singh* (2). In that case, no doubt, the minor was not the sole mortgagee; but he was at least one of the mortgagees. After the sale had taken place the plaintiffs were deprived of the property by reason of defect in their vendor's title. They are entitled to refund by the vendor of the purchase money. I rely on the principle of the ruling in *Dattaram Govindbhai v. Vinayak Ballwishna* (3). The plaintiffs are seeking a refund of the purchase money, not on the ground that they were minors at the date of the sale, but on the ground that the purchased property has passed out of their hands through the fault of their vendor. The vendor fraudulently represented himself to be the owner of the property to which he had no subsisting title. He cannot be allowed to take advantage of his own fraud. Therefore, apart from the warranty of title contained in the sale-deed, the plaintiffs are entitled to a refund on grounds of equity.

Munshi Gulzari Lal (with him Babu Satya Chandra Mukerji),
for the respondent:—

The suit is based on a covenant of title contained in the sale deed. The ground of the suit is either this express contract or an implied contract of covenant of title. The plaintiffs were minors when this contract was made and the question is whether they can enforce it. As has been laid down in the case of *Mohori Bibee v. Dharmodas Ghose* (4), a contract with a minor is absolutely void and unenforceable. Even if it be assumed that the minors were represented by a guardian during the negotiation relating to the sale, still, under the ruling of the Privy Council in 9 A. L. J., cited above, the minors cannot enforce the contract. Then, a sale necessarily involves the idea of a contract. It presupposes a previous mutual agreement and consequently a sale to a minor is void; *Navakoti Narayana Chetti v. Logalinga Chetty* (5). As to the contention that the respondent's conduct amounted to a fraud, there was neither any allegation of fraud nor have the

(1) (1912) I. L. R., 34 All., 273.

(2) (1907) I. L. R., 30 All., 63.

(3) (1903) I. L. R., 28 Bom., 181.

(4) (1903) I. L. R., 30 Cal., 539.

(5) (1900) 19 M. L. J., 752.

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Dr. Surendra Nath Sen, replied.

courts arrived at any finding on this point. The suit is not based on tort but upon the agreement in the sale deed.

GRIFFIN and RYVES, JJ:—On the 17th of November, 1905, the defendant Janak Singh sold certain zamindari property to the plaintiffs, who were then minors. On a suit by third parties the plaintiffs were dispossessed. The plaintiffs, having been unable to obtain a refund of the purchase money from the defendant, brought this suit for its recovery and also for the costs incurred in the litigation with the third parties. In defence it was pleaded, *inter alia*, that the contract was null and void, the plaintiffs having been minors at the date of the execution of the sale deed. The first court decreed the suit in part, namely, for the principal of the sale consideration Rs. 800; Rs. 119 in respect of the costs in the former litigation, and Rs. 260 as interest on the purchase money at 8 annas per cent. per mensem. The defendant appealed, eight grounds being taken in the memorandum of appeal. The lower appellate court disposed of the appeal on one ground only. In the opinion of that court the case was concluded by the decision of their Lordships of the Privy Council in *Mrs. Sarwanayan v. Fakhruddin Mohamed Chowdhury* (1). We think it desirable to set out exactly what was decided by their Lordships in that case, inasmuch as the report of the case, as it appears in the Allahabad Law Journal, is not quite correct (2). Their Lordships state:—"Without some authority their Lordships are unable to accept the view of the learned Judges of the Division Bench that there is no difference between the position and powers of a manager and those of a guardian. They are, however, of opinion that it is not within the competence of a manager of a minor's estate or within the competence of guardian of a minor to bind the minor or the minor's estate by a contract for the purchase of immovable property, and they are further of opinion that as the minor in the present case was not bound by the contract there was no mutuality, and that the minor, who has now reached his majority, cannot obtain specific performance of the contract." The lower appellate court dismissed the plaintiffs' suit. The (1911) L. R., 39 L. A., 1; 9 A. L. J., (2) But cf. *errata slip* attached to A. L. J., No. 19 of 1911—Ed.). (36); 1 L. R., 39 Calo., 232.

plaintiffs are not to be considered as having been defrauded. It appears to us that the defendants have been defrauded, and it would be strange indeed that a vendor, who might have been held guilty of an offence of cheating, should not be held liable to refund to the plaintiffs the money out of which they have been defrauded. The court below decided the case on a preliminary point, and as we are unable to agree with the decision, we allow this appeal, set aside the decree of the lower appellate court and remand the case to that court with directions to recommit the case to the court below. (1) (1903) L. T. R., 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

appeal to its original number in the register and dispose of it according to law. Costs of this appeal will be costs in the cause. Appeal decreed and cause remanded.

REVISIONAL CRIMINAL

Before Mr Justice Rives.

EMPEROR v. AZMAT SHAH KHAN AND OTHERS.

Criminal Procedure Code, sections 517 and 520—Appeal—Jurisdiction—Power of appellate court to pass orders regarding property in respect of which an offence has been committed

Held that section 520 of the Code of Criminal Procedure gives to an appellate court the same power as the court which originally tried a case to pass orders under section 517 of the Code. *Isakram Gogoi v Chinikram Kohla* (1) followed. *In re Devlin Durgaprasad* (2) distinguished.

In this case two persons named Azmat Shah and Krishnand were given licences to manufacture *katcha* (catechu) in a village and both of them put down pits for that purpose. There was a dispute between the two as regards the *katcha* manufactured, and Azmat Shah forcibly took possession of it from Krishnand and in doing so caused wrongful restraint to certain persons who were opposed to his doing so. Azmat Shah and some others were convicted by the court of Assistant Sessions Judge of Bareilly and sentenced to three years' rigorous imprisonment each. On appeal to the Court of the Sessions Judge the conviction was upheld but the sentences passed were reduced. The appellate court further ordered that as it was not satisfied that the whole of the *katcha* recovered was that taken from Krishnand, the parties were to be left to establish their claims to it in the Civil Court. The accused applied to the High Court in revision.

Mr. C. Ross Alston, for the applicants.

The Assistant Government Advocate (Mr. R. Malcomson), for the Crown; Mr. A. H. C. Hamilton, for the opposite party. RIVES, J.—On the facts found in this case I cannot interfere with the conviction. But I think that the sentence, even as modified by the learned Sessions Judge, is under the circumstances of the case unnecessarily severe. I accordingly maintain the

*Original Revision No. 192 of 1913 from an order of H. N. Wright, Sessions Judge of Bareilly, dated the 10th of February, 1913.
(1) (1904) 9 C. W. N., 549.
(2) (1897) 1 L. R., 22 Bom., 844.

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conviction, but reduce the sentence on Azmat Shah to one of six months' rigorous imprisonment and on Abdul Hakim, Najibullah, Asghar Husain, Wahidyar Khan, and Abdulla to one of three months' rigorous imprisonment each.

Mr. Hamilton has argued that the concluding words of the appellate court's order are *ultra vires*. The learned Sessions Judge says:—"I am not satisfied that the whole of the *katha* (catechu) recovered was that taken from Krishnand and the parties will be left to establish their claim to it in the Civil Court." It is argued that under section 517 of the Criminal Procedure Code the only court that could pass orders under that section was the court trying the case, and reliance is placed on *In re Devidin Durgaprasad* (1). This decision, however, was passed before the present Code of Criminal Procedure came into force. It seems to me that section 520 gives an appellate court full power to pass such an order. The same view was taken by the Calcutta High Court in *Balaram Gogoi v. Chintaram Koha* (2).

Application rejected.

Before Mr. Justice Tudball.

EMPEROR v. NANNA MAL.*

Act (Local) No. I of 1900 (*United Provinces Municipalities Act*), section 88—*Municipal Board*—Power of Board to order demolition of structure overhanging a public road—Compensation—Offer to pay compensation not a condition precedent to order for demolition.

The owner of a house to which was attached a balcony overhanging a public road repaired the balcony, which had become dilapidated, and made it serviceable, but without obtaining the permission of the Municipal Board thereto. The board thereupon issued notice to the house-owner under section 88 of the Municipalities Act, 1900, to remove the balcony, and, in default of compliance, prosecuted him.

Held that the board had power, under section 88, clause (2) of the said Act, to order the removal of the balcony without assigning any reason, and that it was not necessary for the board, in the case of a notice issued under section 88, to tender or express its willingness to pay compensation in respect of the structure the demolition of which was ordered.

The facts of this case were as follows:—

One Nanna Mal was the owner of a house in the town of Habbras. There was a balcony attached to this house overhanging a

* Criminal Revision No. 804 of 1912 from an order of Muhammad Nur-ul-Hasan Khan, Magistrate, first class, of Aligarh, dated the 11th of June, 1912. (1) (1897) I. L. R., 22 Bom., 844. (2) (1904) 9 C. W. N., 549.

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public road. It fell into disrepair and the applicant reconstructed it and made it serviceable. He also had a privy in this house, the upper portion of the screening wall of which fell down. He accordingly rebuilt this wall so as to screen the privy from the public gaze. He acted, in both instances, without any sanction from the Municipal Board. On the 22nd of July, 1911, the Board issued a notice to the applicant, as the heading of the notice shows, under section 91, clause (1), and section 88 of the Municipalities Act, and ordered him to remove both the privy and the verandah. He did not comply with the order, and was prosecuted and convicted of offence under section 147 of the Municipalities Act, and has been fined Rs. 20. In the meantime he also brought a civil suit for a declaration that the notice issued by the Municipal Board was *ultra vires* and that he was not bound by it. The suit partly succeeded and partly failed. In so far as the notice under section 91 is concerned, which relates to the privy, the suit was decreed. In so far as the balcony was concerned, the suit was dismissed. Against his conviction and sentence Nanna Mal applied in revision to the High Court.

Babu Pawan Lal Banerjee, for the appellant.

The Assistant Government Advocate (Mr. R. Malcomson), for the Crown.

TUDBAL, J.:—The facts out of which this revision has arisen are as follows. The applicant is the owner of a house in the town of Hathras. There was a balcony attached to this house overhanging a public road. It fell into disrepair and the applicant reconstructed it and made it serviceable. He also had a privy in this house, the upper portion of the screening wall of which fell down. He accordingly rebuilt this wall so as to screen the privy from the public gaze. He acted, in both instances, without any sanction from the Municipal Board. On the 22nd of July, 1911, the Board issued a notice to the applicant, as the heading of the notice shows, under section 91, clause (1), and section 88 of the Municipalities Act and ordered him to remove both the privy and the balcony. He did not comply with the order and was prosecuted and convicted of an offence under section 147 of the Municipalities Act and has been fined Rs. 20. In the meantime he also brought a civil suit for a declaration that the notice issued by the Municipal Board

was *ultra vires* and that he was not bound by it. The suit partly succeeded and partly failed. In so far as the notice under section 91 is concerned, which relates to the privy, the suit was decreed. In so far as the balcony was concerned the suit was dismissed. The question now before me is whether the applicant should have been found guilty of an offence under section 147 of the Act.

Taking first the case of the privy, it is quite clear that section 91, clause (1) or (2), could not apply to the facts of the present case. Under clause (1) the notice contemplated is one requiring the owner or occupier of any building or land to repair, alter, cleanse, disinfect or put in good order or to close any drain, privy or cess-pool. Clause (2) of the section relates really to a new privy built without permission or contrary to directions or regulations or the provisions of the Act or the rebuilding of any privy which the Board had ordered to be demolished or closed or not to be made. It is, therefore, quite clear that section 91 has really no application to the facts of this case and has wrongly been applied by the Board.

As regards the balcony, section 88 is the section under which the Board issued the notice. It must also be noted here that the Board took no action under section 87 of the Act. The notice was issued under section 88. Clause (1) of that section lays down that it shall not be lawful without the written permission of the Board to add to or place against or in front of any building any projection or structure overhanging, projecting into or encroaching on any street. Clause (2) then goes on to say that the Board may, by notice, require the owner or occupier of any building to remove or alter any projection or structure. To this clause there was a proviso that in the case of any such projection which was lawfully in existence at the commencement of the Act, the Board shall make reasonable compensation for any damage caused by the removal. There is nothing in the section limiting the right of the Board to issue the notice contemplated in clause (2) to cases in which the structure is dangerous to the public or insanitary or to cases of a similar nature. Apparently the Board has unlimited power, without assigning any reason, to issue the notice contemplated in clause (2). The proviso merely lays down that in certain cases the Board shall compensate the owner of the structure.

extended the period of limitation, applying the second paragraph of section 20 of the Indian Limitation Act, 1908. On appeal the District Judge came to the conclusion that the word "interest" in section 20 meant the whole of the interest due on a debt, and that, therefore, as only part of the interest was paid on any particular date, section 20 could not be prayed in aid. The suit was accordingly dismissed as barred by limitation. The plaintiffs appealed to the High Court.

Maulvi *Muhammad Rahmat-ullah*, for the appellants.

Maulvi *Muhammad Ishaq*, for the respondents.

RYVES and LYLE, JJ:—The only point in this case is as to whether the suit is barred by limitation. The suit is one for foreclosure of a mortgage, dated the 4th of December, 1874. The mortgagee was in possession and received periodically profits in part satisfaction of the interest agreed upon in the deed. The first court held that these payments extended the period of limitation, applying the second paragraph of section 20 of the Indian Limitation Act. On appeal, the learned District Judge came to the conclusion that the word "interest" in section 20 means the whole of the interest due on a debt and that, therefore, as only part of the interest was paid on any particular date, held that section 20 had no application, and dismissed the suit as barred by limitation. In our opinion "interest" in that section means the interest or any part of the interest due, and we agree with the first court that the suit is not barred by limitation. The rulings to which we have been referred [*Kallu v. Halli* (1) *Anwar Husain v. Lalmir Khan* (2)] are cases of redemption of a mortgage. The latter case expressly distinguishes a suit for redemption from a suit brought by a mortgagee to enforce his remedy. We, therefore, allow the appeal, and, setting aside the decree of the lower appellate court, remand the appeal to that court with directions to readmit it on its original number in the register and dispose of the remaining issues according to law. The costs of this appeal will be costs in the cause.

Appeal decreed and cause remanded.

(1) (1896) I. L. R., 18 All., 295.

(2) (1903) I. L. R., 26 All., 167.

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Before Mr. Justice Ryves and Mr. Justice Lytle.

ACHHAIBAR SINGH, AND OTHERS (PLAINTIFFS) v. RAM SARUP SAHU,
AND OTHERS (DEFENDANTS).*

Hindu Law—Joint Hindu family—Execution of decree—Power of managing member to enter up satisfaction of decree on behalf of the family.

Held that the managing member of a joint Hindu family can execute decrees on behalf of the family, and can receive payment and give good receipts on behalf of the family, which will be binding on the family. *Hori Lal v. Munman Kunwar* (1) followed. *Ganga Dayal v. Mani Ram* (2) distinguished.

THE facts of this case were as follows :—

On the 9th of October, 1890, Bisheshar Sahu, father of defendants Nos. 1, 2 and 3, got a decree against one Bhawani Din for sale of certain shares in certain properties. Bhawani Din (after the decree had been passed) sold the property to the plaintiffs and left Rs. 770, the amount due on the above decree, in the plaintiffs' hands for payment to the decree-holder.

Bisheshar died in 1892, leaving three sons Ram Sarup, Beni Madho and Chunni. Ram Sarup the eldest son, defendant No. 1, applied for execution of the decree, in 1893, and again in 1896. Both applications were struck off for want of prosecution, the second on the 31st of March, 1897, on which date the decretal money was paid to Ram Sarup, and he applied, under section 258 of the Civil Procedure Code of 1882, and the full satisfaction of the decree was accordingly certified. After this, 13 years passed, and then Beni Madho and Chunni, brothers of Ram Sarup, defendants 2 and 3, applied to execute the same decree by sale of the property. They did not make the plaintiffs parties to these execution proceedings, but brought on the record Somai Ahir, defendant No. 4, as representative of Bhawani Din, judgement-debtor. Somai Ahir made an objection that the application was time-barred and that the decree had been satisfied. The plaintiffs also put in an application to the same effect, but it was rejected. Somai Ahir's objection was also dismissed, without the court going into the question as to whether the decree had been satisfied, and the property was ordered to be sold.

* Second Appeal No. 1114 of 1912 from a decree of F. D. Simpson, District Judge of Gorakhpur, dated the 17th of June, 1912, reversing a decree of Kesri Narain Chaud, Munsif of Bausgaon, dated the 30th of April, 1912.

(1) (1912) I. L. R., 34 All., 549. (2) (1909) I. L. R., 31 All., 156.

The plaintiffs then brought the present suit for a declaration that the property could not be sold in execution of the decree. The Munsiff held :—

(1) that the defendants 1, 2 and 3 formed a joint Hindu family and Ram Sarup defendant No. 1 was the manager ;

(2) that the entire joint family was as much benefited by the realization of the decretal amount as defendant No. 1 ;

(3) that it was neither proved nor alleged that defendant No. 1 misappropriated the sum ;

(4) that there had been collusion between the decree-holders and the judgement-debtor ;

(5) that defendants 2 and 3 were 33 and 25 years of age respectively. The application for execution made in 1910, was made three years after their attaining majority.

He accordingly decreed the suit.

On appeal, the District Judge observed :—"There is no question of fact but there are several difficult points of law," and he found as follows :—

(1) that the payment to Ram Sarup did not discharge the decree ;

(2) that section 47 of the Civil Procedure Code barred the suit ;

(3) that the decision of the question of limitation was barred by the principle of *res judicata* ;

(4) that the decision of the Munsif, dated the 30th of May, 1911, was binding on the plaintiffs.

He therefore reversed the Munsif's decision and dismissed the suit. The plaintiffs appealed to the High Court.

Munshi Iswar Saran, on behalf of the plaintiffs appellants, submitted that the position of the manager of a joint Hindu family was peculiar and he enjoyed extensive rights. He represented the entire family in transactions with the outside world. He could make and receive payments on behalf of the whole family. He relied on the Full Bench case of *Hori Lal v. Munman Kunwar* (1). He contended that section 47 of the Code of Civil Procedure did not bar the suit as the decree had been fully satisfied. He referred to *Har Prasad v. Sheo Ram*-(2). He further submitted

(1) (1912) I. L. R., 34 All., 549

(2) (1898) I. L. R., 20 All., 506.

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that, according to section 47, the court had full discretion to treat the plaint as an application in execution. As regards the questions of limitation and *res judicata*, he contended that no order passed in any proceedings to which the plaintiffs were no parties, against the original judgement-debtor, would be binding on his clients, as the original judgement-debtor's interest in the matter completely ceased after the sale to the plaintiffs and the latter could not be said to be the representatives of the former.

Babu Sarat Chandra Chaudhri, (for Dr. Satish Chandra Banerji) for the respondents, contended that the District Judge had not distinctly found that Ram Sarup was the manager of the family. He pressed for a finding on the point. If Ram Sarup was not the manager, he could not give a valid discharge without the concurrence of his other brothers. He submitted that the discretion mentioned in section 47 of the Civil Procedure Code could only be exercised in favour of a decree-holder who instituted the suit. He further submitted that all orders passed against the original judgement-debtors were binding on the appellants as they purchased the property after the decree. He referred to section 52 of the Transfer of Property Act. He also relied on *Ganga Dayal v. Mani Ram* (1) and *Bhagwanta v. Sukhi* (2).

Munshi Iswar Saran was heard in reply.

RYVES and LYLE JJ:—Bisheshar Sahu, father of defendants Nos. 1 to 3, obtained a decree for sale on a mortgage of certain property on the 9th of October, 1890. Bhawani Din, the mortgagor, judgement-debtor, after the decree, sold his equity of redemption to the plaintiff and left Rs. 770 with him out of the consideration money to pay off the mortgage decree. Bisheshar Sahu died, leaving three sons, namely, Ram Sarup, Beni Madho and Chunni. Ram Sarup was an adult and the two younger brothers were minors. After two infructuous applications to execute the decree, the plaintiff paid off the amount of the mortgage to Ram Sarup, and Ram Sarup applied, under section 258 of the old Civil Procedure Code, to have the satisfaction of the decree certified by the court, and this was done on the 31st of March, 1897.

Thirteen years afterwards Beni Madho and Chunni applied to execute the same decree by sale of the property. The plaintiff,

(1) (1909) I. L. R., 31 All., 156.

(2) (1899) I. L. R., 22 All., 33 (46).

o alone had any interest in the property, was not made a party
hese proceedings.

One Somai Ahir was brought on the record as a legal repre-
tative of Bhawani Din, the mortgagor judgement-debtor. The
rt executing the decree found that Beni Madho and Chunni
d made their application within three years of attaining majo-
y, and ordered the property to be sold, and sent the papers to
Collector for compliance. When the sale notification was
ued, the plaintiff first became aware of what had been done.
e applied to the Collector, objecting to the sale on the ground
at the decree had been already executed; his application, how-
er, was dismissed, on the ground that he was no party to the
ecree. Hence this suit.

The Munsif found (1) that the three brothers, Ram Sarup,
eni Madho and Chunni, formed a joint Hindu family and that
am Sarup was the manager, (2) that the joint family was bene-
ted by the payment of the mortgage money, (3) that it was
either alleged nor proved that Ram Sarup had misappropriated
he money. He also held that Ram Sarup, as manager of the
amily, was legally entitled to accept payment and enter satisfac-
ion of the decree, and that his act bound the joint family. He
decreed the suit.

On appeal before the learned District Judge no question of
act was raised. Various legal pleas were taken, only one of
which, however, is now in question in this appeal, and that is,
whether the managing member of a joint Hindu family can have
satisfaction of a decree recorded, so as to bind the other members
of the joint family. The learned Judge says:—"I accept the
finding of the lower court that Ram Sarup and defendants Nos. 2
and 3 were members of a joint Hindu family. The lower court
has found that the head of Hindu family can enter satisfaction of a
decree against himself and other members of the family. I am unable
to agree." This decision of the learned District Judge was given
on the 17th of June, 1912, i.e., before the judgement of the Full
Bench in *Hori Lal v. Munman Kunwar* (1) had been published.

It seems to us that that decision concludes the question and is
full authority for holding that the managing member of a joint

(1) (1912) I. L. R., 34 All., 549.

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muhallas into which the city Benares is divided. On the whole, we see no reason to differ from the view of both the courts below on this point.

With regard to the making of the demands, this is really a question of fact in the present case. It is not alleged that the demands were made in any improper form, or that the words used were not sufficient. The only question which has been urged here is whether or not the plaintiff made the demand immediately after hearing of the sale. This is a pure question of fact and is concluded by the finding of the courts below.

The last question which has been argued in the present appeal is the question of price. It appears that the property was first sold in September, 1908. At that time registration had to be obtained compulsorily and the court below found that the vendee did not obtain actual possession until a period which rendered the present suit not barred by limitation. But it appears that after the last vendee had obtained possession and cut down a *peepul* tree, the property was resold to the present appellant at about four times the original price. The court of first instance threw some doubt upon the *bona fides* of this sale, but the lower appellate court considered this question immaterial and dealt with the case upon the assumption that the sale was *bona fide*. In our opinion, the second sale must be taken to have been made subject to the right of pre-emption and the plaintiff was only bound to pre-empt the first sale, making, of course, the subsequent vendee a party to the suit so as to bind him by the proceedings. This was the view taken by a Bench of this Court in *Kamta Prasad v. Mohan Bhagat* (1).

The result is that the appeal fails on all points and is dismissed with costs.

Appeal dismissed.

(1) (1909) I. L. R., 32 All., 45.

Before Mr. Justice Banerji and Mr. Justice Ryves.

BANKE LAL AND ANOTHER (DEFENDANTS) v. SHANTI PRASAD AND OTHERS
(PLAINTIFFS) AND BIRJ LAL AND OTHERS (DEFENDANTS.)*

1913
April, 25.

Act No. IV of 1893 (*Partition Act*), sections 1, 2 and 3—*Partition—Mortgagee rights in a revenue-paying mahal—Application for sale by owners of less than a moiety—Act (Local) No. III of 1901 (United Provinces Land Revenue Act), section 107.*

Mortgagee rights merely in a revenue-paying mahal do not fall within the purview of the United Provinces Land Revenue Act, 1901, for the purposes of partition: consequently the provisions of the Partition Act, 1893, apply to the partition amongst co-owners of such rights. But an order for sale of the mortgagee rights under section 2 of the Partition Act will not be valid unless based upon the request of a party or parties interested to the extent of one moiety or upwards.

THE facts of this case were as follows:—

In a suit for partition a preliminary decree was passed, and for the purpose of preparing a final decree the court appointed a commissioner and a receiver. Amongst the properties the subject of the partition were the mortgagee rights in one half of a village called Sundhawra. One of the defendants in the partition suit applied to the court apparently under section 2 of the Partition Act, 1893, praying that the mortgagee rights might be sold by auction to the highest bidder among the parties. The interest of the applicant, however, amounted to only one-quarter of the said rights. The application was opposed by other parties to the partition proceedings: but after calling for a report from the receiver, the court passed an order directing the sale of the mortgagee rights to the highest bidder amongst the co-sharers. Against this order the two opposing defendants appealed to the High Court.

Munshi *Haribans Sahai*, for the appellants.

Mr. *M. L. Agarwala*, for the respondents.

BANERJI and RYVES, JJ:—Banwari Lal, Parsotam Das and Ramrich Pal brought a suit for partition of their shares in certain joint property. A preliminary decree was passed in that suit, and for the purpose of preparing a final decree the court appointed a commissioner and receiver. Among the properties ordered to be partitioned are mortgagee rights in one half of the village Sundhawra. On the 15th of May, 1912, Shanti Prasad, who was one of the defendants, and the extent of whose share, as also the share of his minor brother Ram Kunwar, is one quarter, applied to

* First Appeal No. 342 of 1912, from a decree of Pirthvi Nath, Subordinate Judge of Bareilly, dated the 16th of May, 1912.

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the court, apparently under Act IV of 1893, praying that the mortgagee rights be sold by auction to the highest bidder among the parties. This application was opposed by Banke Lal and Ratan Lal. On reference by the court to the receiver and on obtaining a report from him, the court made an order directing the sale of the mortgagee rights to the highest bidder among the co-sharers. The present appeal has been preferred against this order and it is contended that the Partition Act (No. IV of 1893) does not apply to a case like this, inasmuch as the property in question is property paying revenue to Government. Clause (4) of section 1 of the Act is referred to in support of this contention. That clause provides that nothing contained in the Act shall be deemed to affect any local law providing for the partition of immovable property paying revenue to Government. Partition of immovable property paying revenue to Government in these provinces is to be effected under the provisions of the Land Revenue Act, No. III of 1901. Under that Act, separate mahals cannot be formed of mortgagee rights as between the holders of a mortgage. The partition contemplated by that Act is a partition of zamindari rights, and if partition is sought of zamindari rights in respect of property which is under a mortgage, as against other co-sharers of the zamindari rights, the application for partition should, as required by section 107 of the Act, be made by the mortgagor and the mortgagee jointly. In our opinion that Act has no application to a case like this. Under Act IV of 1893, at the request of shareholders interested individually or collectively to the extent of one moiety or upwards, the court may direct a sale of the property ordered to be partitioned and distribution of the proceeds, and where such an order is made, any of the parties other than the applicant may apply for leave to buy at a valuation the share or shares of the party or parties asking for sale. In the present case Shanti Prasad and his brother who applied for sale of the mortgagee rights were share-holders only of one-fourth and not of a moiety. Therefore they alone could not ask the court to sell the mortgagee rights. Other share-holders may have expressed their consent to the sale of the mortgagee rights. But they made no request to the court in that behalf. Therefore, it seems to us, that the court was not competent to take action under section 2 of the Act. If action had been taken under that section, and the court had decided

that the property ought to be sold, the share-holders other than the applicant could under section 3, have applied for a valuation and the court in that case should have ordered a valuation to be made. Neither of these proceedings appears to have been taken. There being no application either under section 2 or under section 3, the court was not competent to make the order passed by it. We must, therefore, set aside its order of the 16th of May, 1912. It will be open to the parties or such of them as may choose to do so, to ask the court to take action under section 2, and in that case, it will be open to other share-holders to apply under section 3, and if such applications be made, it will be the duty of the court to proceed under the provisions of sections 2 and 3. The order complained of is an illegal order. We accordingly allow the appeal, and set aside that order. Under the circumstances we direct the parties to pay their own costs in both courts.

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Appeal allowed.

Before Mr. Justice Banerji and Mr. Justice Ryves.

TODAR MAL AND OTHERS (JUDGEMENT-DEBTORS) v. PHOLA KUNWAR
(DECREE-HOLDER)*

1913
April, 29.

Act No. IX of 1908 (Indian Limitation Act), schedule I, article 128—Execution of decree—Limitation—Step in aid of execution—Application for transfer of decree—Civil Procedure Code (1882), section 223.

Held, that an application made to the court passing a decree to transfer it for execution to another court is an application to take a step in aid of execution within the meaning of article 182 of the first schedule to the Indian Limitation Act, 1908. *Chundra Nath Gossami v. Gurroo Prosunno Ghose* (1) followed.

THE facts of this case were as follows :—

A preliminary decree for sale was passed on the 1st of September, 1897, and it was made absolute on the 17th of November, 1900. The last application for execution, admittedly within time, was made on the 11th of May, 1906. On the 5th of September, 1908, the decree-holder applied to the court at Bareilly, which had passed the decree, to transfer it for execution to the court at Shahjahanpur. This application was made under section 223 of the Code of Civil Procedure, 1882. The certificate asked for was granted; and thereupon an application for execution was made in the court at Shahjahanpur on the 8th of February, 1910.

* First Appeal No. 43 of 1913, from a decree of Gokul Prasad, Subordinate Judge of Shahjahanpur, dated the 12th of September, 1912.

(1) (1895) I. L. R., 22 Calc., 375.

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The judgement-debtors took objection that execution of the decree was time-barred. This objection was disallowed by the executing court, and the judgement-debtors thereupon appealed to the High Court.

Munshi Gobind Prasad, for the appellant.

Babu Sital Prasad Ghosh and Babu Benode Bihari, for the respondents.

BANERJI and RYVES JJ :—This appeal arises out of an application for the execution of a decree, and the question to be determined is whether the application is time-barred. A preliminary decree for sale was passed on the 1st of September, 1897, and it was made absolute on the 17th of November, 1900. The last application for execution, admittedly within time, was made on the 11th of May, 1906. On the 5th of September, 1908, the decree-holder applied to the court at Bareilly, which had passed the decree, to transfer it for execution to the court at Shahjahanpur. This application was made under section 223 of the Code of Civil Procedure, 1882. The certificate asked for was granted, and thereupon an application for execution was made in the court at Shahjahanpur on the 8th of February, 1910. It is this application which the appellants contend is time-barred. The court below has held against the appellants, and in our judgement its decision is right. The present application for execution would be within time if the application of the 5th of September, 1908, was one to take a step in aid of execution, within the meaning of article 182, schedule I, of the Limitation Act. No application for execution could be made in a district outside the jurisdiction of the court which passed the decree unless that court made an order transferring the decree for execution. An application for transfer of the decree is, therefore, an essential and necessary step preliminary to the making of an application for execution in a court which is not the court which passed the decree. Such an application is clearly an application to take a step in aid of execution. This was so held by the Calcutta High Court in *Chundra Nath Gossami v. Gurroo Prosunno Ghose* (1), and we agree with that ruling. We dismiss the appeal with costs.

Appeal dismissed.

PRIVY COUNCIL.

P. C.*
1913
April 15, 16;
June 10.

JANKI PRASAD SINGH (DEFENDANT) v. DWARKA PRASAD SINGH
(PLAINTIFF).

APPEAL AND CROSS APPEAL CONSOLIDATED.

[On appeal from the Court of the Judicial Commissioner of Oudh, at
Lucknow.]

Act No. I of 1869 (Oudh Estates Act), sections 2, 3, 8, 10 and 22—Summary and regular settlements of Oudh—Villages settled on grantees whose name was entered as owner in Lists 1 and 2 of those prepared under section 8—"Taluqdar"—"Estate" under section 2—Impartible property—Kabuliat executed by grantee after the time limit specified in section 3—Suit for partition—After-acquired properties held to be partible, there being no intention shown to incorporate them with the impartible property.]

At the summary settlement of Oudh an order was made on the 5th of October, 1859, for the settlement* of certain villages with the ancestor of the parties to these appeals, who, however, did not execute his *kabuliat* until the 13th of October, 1859, and so not within the time limit specified in section 3 of the Oudh Estates Act (I of 1869), namely "between the 1st of April, 1858, and the 10th of October, 1859." At the regular settlement, shortly afterwards, the grantee recovered decrees for possession of other villages; and subsequently acquired other properties by purchase. In respect of all the settled villages his name was entered in Lists 1 and 2 prepared under the statutory provisions of section 8 of the Act. In a suit for partition to which the defence was that all the property was impartible,

Held (affirming the decisions of the Courts in India) that the grantee (the defendant) was, on the construction of the provisions of Act I of 1869 relating thereto, a "talukdar," and the villages so settled with him formed, within the meaning of the Act, an "estate" which was impartible and descendible to a single heir.

On a question whether the delay in executing the *kabuliat* deprived the taluqa of the character of an "estate" defined in section 2 of the Act, the Judges of the Judicial Commissioner's Court differed in opinion.

Held, in the absence of an express declaration that non-execution within the time specified would be fatal to the right given to the grantee by section 3, that no such construction could be put on that section; but the execution of the *kabuliat* related back to the date of the settlement, namely the 5th of October, 1859.

As to the after-acquired properties the defendant contended that by the custom of the family they became part of the original estate and were therefore not subject to the ordinary Hindu law of inheritance.

Held (affirming the decisions of both courts below) that the evidence was insufficient to establish that custom; that no intention of the talukdar was shown to incorporate the subsequently acquired properties with the taluqa, as

* *Present*: —Lord SHAW, Lord MOULTON, Sir JOHN EDGE, and Mr. AMEER ALI.

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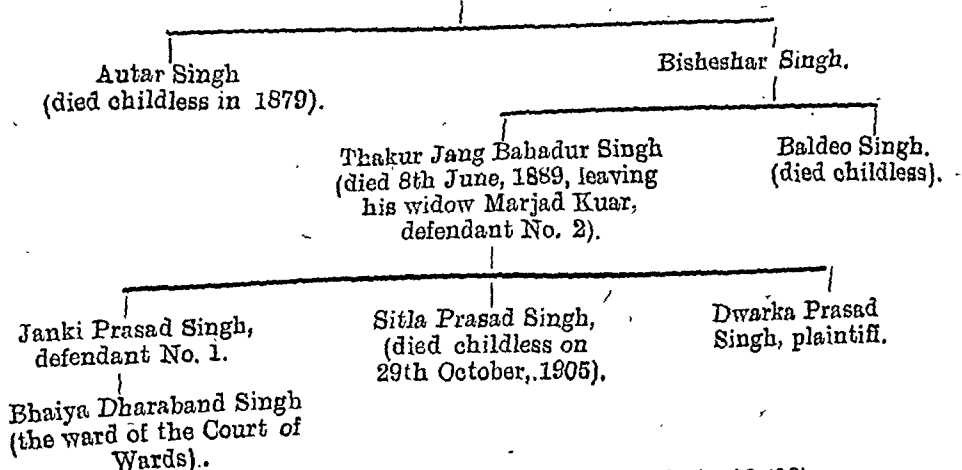
was necessary on the authority of the case of *Parbati Kumari Devi v. Jagadis Chunder Dhabal* (1); and that the plaintiff was therefore entitled to a decree for his share (one half) of such properties as being partible.

APPEAL (116 of 1911) and cross appeal (117 of 1911) consolidated, from a judgement and decree (8th September, 1909) of the Court of the Judicial Commissioner of Oudh, which affirmed with slight variation the decree (15th September, 1908) of the Court of the Subordinate Judge of Bara Banki.

The suit which gave rise to these appeals was instituted by Dwarka Prasad Singh for partition of certain properties in the possession of his brother the first defendant Janki Prasad Singh, claiming that such properties constituted ancestral estate of the family partible between them. The defence of Janki Prasad Singh was that the "properties in suit were impartible, and that no partition can be or ever has been made in this family in accordance with the prevailing custom" which obtained from ancient times. The first defendant had died and was now represented by Dhara-band Singh his minor son, who appeared by his guardian the Deputy Commissioner of Bara Banki as representing the Court of Wards. The second defendant Marjad Kuar (the mother of the plaintiff and of the first defendant) was also dead, and no question now remained as to her interest in the properties in suit.

The following extract from the family pedigree shows the relationship of the parties, and explains the history of the litigation which is stated in their Lordships' judgement, together with the relevant sections of the Oudh Estates Act (I of 1869).

SHEO DAT SINGH.



(1) (1902) 1 L. R., 29 Cal., 433 (453) : L. R., 29 I. A., 82 (98).

The main questions for determination in these appeals were whether the properties in suit were impartible, and whether, they devolved on a single heir under the provisions of the Oudh Estates Act (I of 1869).

The history of the family showed that certain of the villages of which the properties in suit consisted had been settled upon Autar Singh, an ancestor of the parties, at the Summary Settlement in 1859, and at the Regular Settlement shortly afterwards; and that other properties had been subsequently acquired by him. As to the properties which had been settled, the Subordinate Judge held that they constituted an "estate" within the meaning of section 2 of Act I of 1869, and were consequently impartible and devolved by family custom on a single heir; but as to the after-acquired properties he held that they were joint and partible; and he gave the plaintiff a decree for partition, and delivery of possession of a one-third share in them, dismissing the suit as to the settled portion of the properties.

From that decision both parties appealed to the Court of the Judicial Commissioner, the plaintiff asking for a half-share, as the second defendant had died.

The Appellate Court consisted of Pandit SUNDAR LAL (1st Additional Judicial Commissioner) and Mr. PIGGOTT (2nd Additional Judicial Commissioner), who affirmed the decree of the Subordinate Judge, except that they gave the plaintiff a half share instead of a one-third share in the after-acquired properties. On the question whether the settled properties did or did not form a taluqdari estate within the meaning of Act I of 1869, the Judges differed in opinion, Pandit SUNDAR LAL holding that the Summary Settlement of the villages in 1859 not having been concluded before the 10th of October (certain formalities being only carried out on the 13th of October, 1859), those villages did not form part of an "estate" as defined in section 2 of Act I of 1869, and that the succession to them was consequently not governed by the provisions of that Act: and Mr. PIGGOTT holding that the settlement ought to be presumed to have been made on the 5th of October, 1859, when the Commissioner had made an order that the villages should be "settled."

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Both appeals were dismissed with costs by the Court of the Judicial Commissioner: and both parties appealed to His Majesty in Council, the defendant's appeal being 116 of 1911 and the plaintiff's 117 of 1911.

On these appeals—

Sir H. Erle Richards, K. C., and Kenworthy Brown for the defendant contended that the villages originally settled at the summary and regular settlements formed an estate within the meaning of the Oudh Estates Act (I of 1869), and did not lose the character of an "estate" under that Act, by reason of the execution of the *kabuliat* not having been made by Autar Singh within the period mentioned in section 3, and reference was made to sections 2, 3, 8 and 10 of that Act, and Sykes' *Taluqdari Law*, pages 378, 389 and 392 with regard to the Lists of *Taluqdars* whose estates descended according to the custom of impartibility. That custom, it was contended, had been established by the evidence and governed the succession of all the property in dispute; Act XVII of 1876 (Oudh Land Revenue Act), section 17, was referred to. If a custom of impartibility was shown to govern the originally settled property, as, it was submitted, had been done, the *onus* rested on those who alleged it to show with regard to the after-acquired property that it was partible, and not impartible like the original property. When such a custom has been established as to certain family land, anyone who alleges that others of the family lands are not impartible must prove his allegation. The authorities, it was submitted, showed that. Reference was made to *Thakur Ishri Singh v. Thakur Baldeo Singh* (1), *Jagdish Bahadur v. Sheo Partab Singh* (2), *Ibrahim Ali Khan v. Muhammad Ahsan-ullah Khan* (3) and *Rajendra Bahadur Singh v. Raghubans Kuar* (4).

The Courts in India had erred in allowing the plaintiff to set up a new case not originally pleaded, namely, that all the properties in suit were not governed by the same law, and in giving him a decree for some of them on the footing that they were partible; and by reason of the fact that that case was not set up in the plaint, the defendant had no opportunity of showing that

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| (1) (1884) I. L. R., 10 Cal., 792 (807): L. R., 11 I. A., 135 (139, 140). | (3) (1912) I. L. R., 39 Cal., 711: L. R., 39 I. A., 85. |
| (2) (1901) I. L. R., 28 All., 369: L. R., 28 I. A., 100. | (4) (1908) 11 Oudh Cases, 256 (258, 260). |

the intention of the taluqdar was that the lands subsequently acquired should form part of the originally settled lands, and he governed by the same custom of impartibility. The plaintiff, it was submitted, was not entitled to any of the property as being partible, but his suit should have been wholly dismissed.

De Gruyther, K. C. and *B. Dube* for the plaintiff contended that the summary settlement in 1859 had not been made before the 13th of October, 1859, when Autar Singh signed the *kabuliat*, which was not within the time limited by section 3 of Act I of 1869; and that the provisions of that Act were therefore not applicable. The property then settled was consequently not an "estate" under that Act, but was governed by the ordinary Hindu law of the Mitakshara, and was therefore partible. With respect to the after-acquired property, the Courts in India had found that it was not to be treated as being governed by the custom of impartibility set up by the defendant; and there was no condition in the grant which prohibited the partition of that property. There was moreover no intention by the taluqdar shown to incorporate the acquired property with that originally settled. [Lord SHAW referred a passage from the case of *Parbati Kumari Debi v. Jagadis Chunder Dhabal* (1) from page 453 of I. L. R., 29 Calc., lines 32 to 36]. Both Courts below had concurrently held to that effect. Reference was made to Act I of 1869, sections 2, 3, 8, 10, 22 and schedule I: Sykes' Taluqdari Law, pages 13, 28, and 285: Mayne's Hindu Law, 7th ed., page 61, para. 54, and page 633, para. 469. Judgements in fact ought not to be disturbed unless shown to be substantially wrong; *Hyder Hossain v. Mahomed Hossain* (2): and as to proof of custom *Bhau Nanaji Utpat v. Sundrabai* (3): also Parliamentary Papers relating to Oudh, Chief Commissioner's letter of the 28th of January, 1859.

Sir H. Erle Richards, K. C., replied.

1913 June 13th:—The judgement of their Lordships was delivered by Mr. AMEER ALI:—

These are two consolidated appeals from a judgement and decree of the Court of the Judicial Commissioner of Oudh, dated the 8th of September, 1909, and arise out of a suit brought by the plaintiff

(1) (1902) I. L. R., 29 Calc., 433:

L. R., 29 I. A., 82.

(2) (1872) 14 Moo. I. A., 401 (407).

(3) (1874) 11 Bom. H. C., 249 (269).

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Dwarka Prasad in the Court of the Subordinate Judge of Bara Banki, for partition of certain properties known as taluqa Ranimau, in which he claimed a share as a member of a joint Hindu family governed by the Mitakshara Law.

The two defendants to this action were the plaintiff's elder brother Janki Prasad and their mother Marjad Kuar, and as the mother, under the Mitakshara Law, is entitled on the partition of ancestral property to an equal share with the sons for her life, the plaintiff asked for a decree in respect of a third share in the entire property included in the list attached to the plaint.

The defendant Janki Prasad alone contested the suit, the ground of his defence being that the taluqa sued for was, under the provisions of Act I of 1869, as also by custom governing the family, an impartible estate descendible to a single heir, to which the ordinary rules of the Hindu law of inheritance did not apply. The parties thus went to trial on two distinct issues, viz., whether the properties in suit belonged to a joint Hindu family and were subject to the incidents ordinarily attached to such properties, or whether they formed in whole or in part, under Act I of 1869 or by custom, an impartible estate.

A short history of the family will explain the reasons on which the Courts in India have proceeded in arriving at their conclusions. The nucleus of the taluqa in dispute is said to have been formed by one Suk Shah. He owned nine villages, but the number increased to sixteen in the hands of his son and successor, Sakat Singh, who lived about the close of the 18th century. In 1856, when the British first occupied the kingdom of Oudh, the taluqa included 21 villages, and was held by Autar Singh, eighth in descent from Gulal Shah, the original ancestor of the parties and the grand father of Suk Shah. On the outbreak of the Mutiny Autar is said to have disappeared. Nor did he make his appearance on Lord Canning's famous Proclamation issued in March, 1858. The British authorities accordingly proceeded to make a settlement of his confiscated villages with third parties. But some time in July, 1859, Autar appeared before the authorities, explained the reason of his non-appearance before, and applied for a settlement of his villages. They were apparently satisfied with his explanation, and on the 5th of October, 1859, an order was passed

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the Act, and are, consequently, impartible; whilst the defendant urges that the properties, a half share of which has been decreed to the plaintiff, being accretions to the "estate" or taluqa are equally impartible.

As regards the contention of the plaintiff, the first point to determine is the meaning which the Legislature has attached to the word "estate" with reference to properties coming within the purview of Act I of 1869, and that meaning must be gathered so far as possible from the enactment itself.

The term "estate" is defined in section 2 to mean "the taluqa or immovable property acquired or held by a taluqdar or grantee in the manner mentioned in section 3, section 4 or section 5, or the immovable property conferred by a special grant of the British Government upon a grantee." And "taluqdar" is declared to mean a person whose name is entered in the first of the lists mentioned in section 8.

Section 3 declares that :—

"Every taluqdar with whom a summary settlement of the Government revenue was made between the first day of April, 1858, and the tenth day of October, 1859, or to whom, before the passing of this Act and subsequently to the first day of April, 1858, a taluqdari sanad has been granted, shall be deemed to have thereby acquired a permanent, heritable and transferable right in the estate comprising the villages and lands named in the list attached to the agreement or *kabuliyat* executed by such taluqdar when such settlement was made, or which may have been or may be decreed to him by the Court of an officer engaged in making the first regular settlement of the province of Oudh, such decree not having been appealed from within the time limited for appealing against it, or, if appealed from, having been affirmed."

Section 8 provides that :—

"Within six months after the passing of this Act, the Chief Commissioner of Oudh . . . shall cause to be prepared six lists, namely :—

"*First*.—A list of all persons who are to be considered taluqdars within the meaning of this Act.

"*Second*.—A list of the taluqdars whose estates, according to the custom of the family on and before the thirteenth day of February, 1856, ordinarily devolved upon a single heir."

The rest of the section is immaterial for the purposes of this case. Section 22 lays down the rules relating to intestate succession to the estates of taluqdars whose names have been entered in the second, third or fifth of the lists mentioned in section 8. In the first instance it declares that if any taluqdar whose name is so entered were to die intestate as to his estate, such estate shall

descend "to the eldest son of such taluqdar or grantee, heir or legatee, and his male lineal descendants, subject to the same conditions and in the same manner as the estate was held by the deceased."

It is common ground that "a summary settlement of the Government revenue" was made with Autar Singh in respect of nine villages "between the 1st day of April, 1858, and the 10th day of October, 1859." Their Lordships are not omitting from consideration the fact that the *kabuliat* was not executed until the 13th of October. To this they will advert later. It is also admitted that he obtained decrees in respect of six other villages in the first regular settlement of the Province, and that his name was entered in the Lists prepared under the statutory provisions of section 8. It is clear, therefore, that Autar was not only a taluqdar, but that his taluqa acquired by virtue of the above-recited proceedings, was an "estate" within the meaning of the Act.

One of the learned Judges in the Court below has considered that the execution of the *kabuliat* after the time-limit mentioned in section 3, deprived Autar Singh's taluqa of the character of an estate defined in the Statute, although in his conclusion he agreed with the Subordinate Judge in holding that it was impartible property. His view may shortly be summarized as follows: as the principal villages included in the taluqa were not acquired either under a grant or a summary settlement made between the two dates mentioned in section 3, the property did not constitute an "estate" defined in section 2; but as it appeared in the evidence that the taluqa had ordinarily devolved upon a single heir on and before the 13th of February, 1856, it must be treated as an impartible estate descendible under the rules of devolution provided in section 22.

The other learned Judge held in substance that under the circumstances of the case it may fairly be assumed that the summary settlement with Autar was made before the 10th of October, 1859.

In their Lordships' judgement the less technical construction seems more in accord with the true intent of the enactment. It is easily conceivable that a settlement might be made within the

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time-limit, and yet the formal documents connected therewith might not, owing to causes beyond the control of the person with whom the settlement is made, be executed until later. The law must be absolutely explicit that non-execution within the time is fatal to the right which it expressly gives before it can be so construed. Section 3, which declares the right a taluqdar acquires in villages and lands settled with him, states that "he shall be deemed to have acquired thereby," (that is by the summary settlement), "a permanent heritable and transferable right in the estate comprising the villages and lands named in the list attached to the agreement or *kabuliat* executed by such taluqdar when such settlement was made." The right the taluqdar is declared to have acquired comes into existence with the settlement, the rest of the clause merely describes the properties with respect to which it takes effect. If the settlement was directed, on the 5th of October, to be made with Autar Singh, the delay in the signing of the formal documents would not affect the right he acquired thereby, as the execution of the agreement would relate back to the time when the settlement was in fact made. The authorities charged with the execution of the duties imposed by section 8 of the Act do not appear to have considered that the delay which had occurred in the signing of the *kabuliat* affected Autar Singh's rights in the properties settled with him in 1859, or differentiated him from the other taluqdars; and although the settlement had been made with him as *malguzar*, he was, in fact, included as a taluqdar in the general lists prepared under the section, and the property of Ranimau was entered against his name as the estate in his possession. Section 10 of the Act provides that "the courts shall take judicial notice of the said lists and shall regard them as conclusive evidence that the persons named therein are such taluqdars or grantees."

Their Lordships have no hesitation in holding that the properties settled with Autar Singh in 1859, together with those of which he obtained possession under decrees passed in his favour in the course of the regular settlement, constitute an "estate" within the meaning of the Act, and are consequently impartible.

The defendant's appeal relates to that portion of the lower court's decree which, affirming the order of the Subordinate

Judge, awarded to the plaintiff a half share in the properties subsequently acquired by Autar Singh. Janki Prasad has died since the institution of this appeal, and he is now represented by his minor son Dharaband Singh. It is contended on his behalf that by the custom of the family these acquisitions became part of the original estate, and are, therefore, not subject to the ordinary rules of inheritance.

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Both the courts in India have come to the conclusion that the evidence is insufficient to establish the alleged custom. And no adequate reason has been shown to induce their Lordships to take a different view. The only other point that remains to be considered is whether the lands subsequently acquired were as a matter of fact incorporated with the taluqa. As has been pointed out by this Board in the case of *Parbati Kumari Debi v. Jagadis Chunder Dhabal* (1), the question whether properties acquired by an owner become part of "the ancestral estate for the purpose of his succession," depends on his intention to incorporate the acquisitions with the original estate.

The courts in India have concurrently found against the defendant on this point, and their Lordships see no reason to differ from their conclusion. Both courts appear, however, to have fallen into an error in respect of one property, Kamrauli, for a half share of which they have made a decree in favour of the plaintiff. It is admitted on his behalf that Kamrauli is one of the villages for which Autar Singh obtained a decree in the regular settlement proceedings. The decree of the lower court must, therefore, be varied by the elimination of Kamrauli.

Subject to this variation both appeals will be dismissed, each party bearing his own costs.

And their Lordships will humbly advise His Majesty accordingly.

Appeals dismissed.

Solicitor for Janki Prasad Singh:—*The Solicitor, India office.*

Solicitors for Dwarka Prasad Singh:—*Barrow, Rogers & Nevill.*

J. V. W.

(1) (1912) I. L. R., 29 Cal., 493 ; L. R., 29 I. A., 82.

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May, 1.

APPELLATE CIVIL.

*Before Mr. Justice Sir George Knox and Mr. Justice Muhammad Rafiq.*AMIN-UD-DIN HAIDAR (JUDGEMENT-DEBTOR) v. SHEORAJ SINGH
(DECREE-HOLDER.) **Civil Procedure Code (1882), Chapter XX—Insolvency—Insolvent discharged without a schedule of debts being framed—Attempt on the part of creditor to proceed against after-acquired property.*

Where an insolvent had taken advantage of the provisions of chapter XX of the Code of Civil Procedure, 1882, and had been discharged under section 351, but no schedule of debts had been framed, it was held that a judgement-creditor of the insolvent could not thereafter have recourse against property which had come into the hands of the insolvent subsequently to his discharge.

THE facts of this case were as follows :—

One Amin-ud-din Haidar was declared a discharged insolvent in 1904. In his application for insolvency, among others, a debt due to Sheoraj Singh was mentioned, but no schedule of creditors was prepared, nor were any objections taken to his discharge. Another debtor, Ratan Lal, had applied to prove his debt and the District Judge had ordered his debt to be entered in a schedule and his name to be recorded as that of a creditor who had proved his claim; but that order was reversed in appeal to the High Court (1). Some time after his discharge, Amin-ud-din Haidar inherited certain property, and thereupon Sheoraj Singh applied to proceed against this property by way of execution. His claim was dismissed, and he was directed to take proceedings under the Provincial Insolvency Act. He then applied to prove his debt and have the property distributed among the creditors through a receiver who, it seems, had been appointed in the interval. The Judge dismissed the objections of Amin-ud-din Haidar, and allowed the application, on the ground that, although the High Court had reversed the order including Ratan Lal's claim, the order of appointment of the receiver had not been appealed against and had become final. The insolvent appealed to the High Court.

Mr. S. N. Mushran (The Hon'ble Dr. Tej Bahadur Sapru with him), for the appellant :

* First Appeal No. 4 of 1913, from an order of G. O. Badhwar, District Judge of Shahjahanpur, dated the 21st of September, 1912.

(1) F. A. F. O. 105 of 1910, decided by Knox and Piggott, JJ., on the 5th of May, 1911.

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This was an attempt to get behind the order of the High Court disallowing the claim of Ratan Lal. No schedule of creditors was prepared and no steps could be taken against the discharged insolvent. Proceedings had been taken under section 351 of Act XIV of 1882. It was not material whether the debt was admitted or not. It had to be proved by the creditor to the satisfaction of the court. It was a matter between the creditors *inter se* as well as between creditor and debtor. The preparation of the schedule was imperative. Otherwise any fictitious claim could be admitted and the right of creditors defeated. Section 357 also spoke of "scheduled creditors" only. These proceedings were taken under section 24 of the Provincial Insolvency Act, but that provided for steps before the discharge and not after. The applicant could not now proceed against the property of the discharged insolvent.

Mr. *Nihal Chand* (for Mr. *B. E. O'Connor*), for the respondent:

It appeared that Amin-ud-din Haidar was declared discharged at the same time as he was declared insolvent. He had no property and it was not necessary to appoint a receiver. The debt of Sheoraj Singh was admitted by the appellant in his application for insolvency. The order appointing a receiver and vesting property in him had not been appealed against and had become final. Property was with the receiver and under section 24 applicant could prove his debt. The insolvent could not be said to have been properly discharged.

KNOX and MUHAMMAD RAFIQ JJ :—Hakim Amin-ud-din is a judgement-debtor of one Kunwar Sheoraj Singh. There were proceedings in the court of Shahjahanpur prior to the proceedings out of which these proceedings have risen and with regard to those proceedings it is sufficient to say that Hakim Amin-ud-din did apply to be declared an insolvent. He was declared an insolvent and he was discharged under section 351 of the Code of Civil Procedure of 1882. These proceedings relating to his discharge have been laid before us and we have examined them. We find that in one of them, i.e., an order by the District Judge, dated the 27th of January, 1904, it is set out, "no other creditor except Ratan Lal proves his claim to-day, though called upon." It was doubtless for this reason that no schedule was prepared and

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very properly so; for a schedule cannot be prepared by a court until the creditors have proved their claims. This was the law under the procedure prevailing up to the passing of the Provincial Insolvency Act of 1907.

In 1912 Sheoraj Singh applied to the court of the District Judge and he asked that certain property which had come into the possession of the judgement-debtor might be placed at the disposal of the Collector of Budaun, so that he might arrange for the payment of the debt due to Sheoraj.

The application was opposed by Hakim Amin-ud-din, the judgement-debtor, who said that he had been discharged from all debts and the court had no power to make the property which he had since acquired liable. The District Judge granted the application of Sheoraj and directed that one Saiyid Janab Ahmad who had been appointed receiver in 1910 should realize the assets of the insolvent and divide them between the two scheduled creditors, Ratan Lal and Sheoraj Singh.

It is this order which forms the subject of the present appeal.

We have looked at the record ourselves. We cannot find, and neither of the learned counsel for the parties can point to, any schedule of creditors. Amin-ud-din in his memorandum of appeal himself says that as no schedule of creditors was prepared before the discharge of the insolvent the applicant cannot be allowed to proceed against the appellant. There being no schedule of creditors to this case Kunwar Sheoraj Singh cannot now enforce his decree as though he were a scheduled creditor.

The appeal prevails, the order of the court below is set aside, but we do not think this is a case in which the judgement-debtor is entitled to his costs.

Appeal allowed.

1913
May, 1.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Lyt's
BALGOBIND BHAGAT AND ANOTHER (PLAINTIFFS) v. NAGINA MISIR

AND ANOTHER (DEFENDANTS).*

Act (Local) No. II of 1901 (Agra Tenancy Act), section 20—Occupancy holding—Mortgage—Sub-mortgage by mortgagee of occupancy holding—Rights of sub-mortgagees.

Where the usufructuary mortgagee of an occupancy holding purported to sub-mortgage his mortgagee rights, it was *held* that the sub-mortgagees were entitled to a money decree against their sub-mortgagor for the money advanced by them.

THE facts of this case were as follows :—

Certain property, consisting partly of a fixed rate holding and partly of an occupancy holding, was transferred by way of usufructuary mortgage to one Nagina Misir in 1906. In 1909 Nagina Misir purported to make a sub-mortgage of the same property in favour of Balgobind Bhagat and Mahabir Ram. The sub-mortgagees sued for the amount of the mortgage money, principal and interest, or in the alternative for possession of certain property. The court of first instance gave the plaintiffs a money decree. On appeal, however, the lower appellate court reversed this decree and dismissed the suit. The plaintiffs thereupon appealed to the High Court.

Mr. M. L. Agarwala and Babu Benode Bihari, for the appellants.

The Hon'ble Dr. Tej Bahadur Sapru, for the respondents.

RICHARDS, C. J. and LYLE, J.—This appeal arises out of a suit in which the plaintiffs claimed the sum of Rs. 499-15-0 principal and Rs. 270 interest. In the alternative they claimed that they might be put into possession of certain property. The court of first instance gave a simple money decree. The lower appellate court reversed the decree of the court of first instance and dismissed the plaintiff's suit; hence this appeal.

It appears that certain property, consisting partly of a fixed rate holding and partly of an occupancy holding was transferred by way of usufructuary mortgage to Nagina Misir in 1906. In 1909 Nagina Misir purported to make a sub-mortgage of the same property in favour of the plaintiffs. There can be

* Second Appeal No. 1069 of 1912 from a decree of Kalika Singh, District Judge of Ghazipur, dated the 21st of June, 1912, reversing a decree of Ganga Nath, Munsif of Ballia, dated the 22nd of March, 1912.

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no doubt that the mortgage of 1906, in so far as it purported to mortgage an occupancy holding, was absolutely void. Indeed we think, though it is not essential for the decision of the present case to decide the point, that the whole mortgage of 1906 was invalid. The defendants contend that the very same doctrine ought to be applied to the sub-mortgage, and that, the contract being an illegal one, the plaintiffs should not be allowed to get even a simple money decree. If the mortgagees under the mortgage of 1906 were unable to recover either the property or to get a separate money decree for the amount lent (and it is admitted they did not get possession) it would be on the ground that the contract was an illegal contract. We have therefore to see whether the contract which was made in 1909 between the plaintiffs and the defendants was also illegal. Section 20 of the Agra Tenancy Act provides that the interest of an occupancy tenant is not transferable save as therein mentioned. But in 1909 Nagina Misir was not an occupancy tenant nor had he any of the rights of an occupancy tenant vested in him. The transfer to him by the occupancy tenant was absolutely void, at least in respect of the occupancy holding. Therefore it seems to us that Nagina Misir, not being an occupancy tenant, did nothing in contravention of section 20 of the Tenancy Act when he executed the sub-mortgage. He really did nothing worse than if he had purported to make a mortgage of property which did not belong to him. In the absence of fraud there would be no illegality in this. We therefore think that under the circumstances of the present case the plaintiffs were entitled to a simple money decree. We accordingly allow the appeal, set aside the decree of the lower appellate court and restore the decree of the court of first instance with costs.

Appeal allowed.

REVISIONAL CRIMINAL.

1913
May, 1.*Before Mr. Justice Tudball.*

EMPEROR v. NEPAL AND OTHERS.*

*Criminal Procedure Code, sections 55, 56 and 110—Arrest of suspected person—
Warrant—Procedure.*

Section 55 of the Code of Criminal Procedure is independent of Chapter VIII of the Code, although proceedings under that chapter may follow an arrest under section 55 as a natural sequence. An officer in charge of a police station can, therefore, arrest or cause to be arrested, without a warrant or an order of a Magistrate, any person who is by repute an habitual robber, house-breaker or thief, or otherwise comes within the scope of section 110.

In this case a police sub-inspector, one Har Prasad, deputed certain police officers subordinate to himself to arrest a person named Nepal, against whom the police were about to take proceedings under section 110 of the Code of Criminal Procedure with a view to his being bound over to be of good behaviour, and gave them a written order to carry out the arrest. Nepal and others resisted the police who were sent to arrest Nepal, and ultimately thirteen persons were sent up for trial and were convicted on charges under sections 147, 225B and 332 of the Indian Penal Code. The persons so convicted appealed to the Sessions Judge, who, however, dismissed their appeals. They then applied in revision to the High Court, raising two pleas, one, that the arrest of Nepal was illegal, and the other that the sentences were too severe.

Mr. C. Ross Alston and Mr. A. H. C. Hamilton, for the appellants.

The Assistant Government Advocate (Mr. R. Malcomson), for the Crown.

TUDBALL, J.—The thirteen applicants have been convicted of offences under sections 147, 225B and 332 of the Indian Penal Code. Their convictions and sentences were upheld on appeal. The present application for revision raises two points—(1) That the arrest without a warrant of Nepal by the police was illegal and therefore the resistance offered to the police constituted no offence, and (2) that the sentences are too severe. According to the evidence on the record, the Sub-Inspector, Har Parsad, deputed certain police officers subordinate to himself to arrest

* Criminal Revision No. 319 of 1913 from an order of A. Sabonadiere Sessions Judge of Aligarh, dated the 22nd of February, 1913.

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v.
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Nepal against whom the police were about to take proceedings under section 110 of the Code of Criminal Procedure with a view to his being bound over to be of good behaviour. According to the evidence, the police officer in question gave a written order to his subordinate officer to carry out this arrest. The plea in revision is that in the absence of the authority under chapter VIII of the Code of Criminal Procedure, the police cannot arrest without a warrant a person against whom proceedings under section 110 are contemplated. Under section 55, clause (c), an officer in charge of a police station may arrest or cause to be arrested any person who is by repute an habitual robber, house-breaker, or thief or habitual receiver of stolen property knowing it to be stolen or who by repute habitually commits extortion or in order to the committing of extortion, habitually puts or attempts to put persons in fear of injury. This is a section which is independent of Chapter VIII, although proceedings under Chapter VIII may follow such arrest as a natural sequence. Such a police officer may arrest without an order from a magistrate and without a warrant.

Section 55 says: "He may in 'like manner' arrest ~~and~~ 'like manner' refers to section 54, which gives a police officer power to arrest without an order from a magistrate and without a warrant in certain specified cases. Section 56 points out that where any officer in charge of a police station requires any officer subordinate to him to arrest without a warrant any person, he may deliver to the officer required to make arrest an order in writing. So far as the evidence on the record goes, all the provisions of these sections were fully complied with, and the police were justified in making the arrest or attempting to make the arrest. Moreover, according to the evidence of the Sub-Inspector, the action he was taking was in pursuance of the permission of the Sub-divisional officer. Even that was not necessary under section 55. The plea has, therefore, no force in the circumstances of the present case.

There remains the question of sentence. The only portions of the sentences which need any comment, are the fines. Nepal has received a sentence of two and a half years' rigorous imprisonment and a fine of Rs. 100. Moti Ram has been sentenced to one

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year's rigorous imprisonment and a fine of Rs. 300. Musammat Ram Kunwar, the wife of Nepal, to four weeks' imprisonment and Rs. 30 fine. The three youths, Har Lal, Jagram and Kamal Singh, have been bound over under section 562 and have been fined Rs. 75, Rs. 20 and Rs. 20. The other applicants have been sentenced to imprisonment only. In some cases, where fines are imposed in lieu of terms of imprisonment, it may be necessary to impose heavy fines. But, in the present case, the accused have received substantial sentences of imprisonment and the extra fines imposed will transfer a part of their punishment to their dependants also. In the case of Nepal, I set aside the fine completely. His sentence under section 225 B, will remain six months without fine. In the case of Moti Ram, his sentence is a fine of Rs. 300 under section 225 B *plus* one year's rigorous imprisonment under section 332 of the Indian Penal Code and six months under section 147 of the Indian Penal Code. In his case, as the fine is the only sentence imposed under section 225 B, I reduce it to one of Rs. 30 or in default six weeks' imprisonment. In the case of Ram Kunwar, she was sentenced to a fine of Rs. 30 under section 225 B. No term of imprisonment was imposed for this offence. For offences under sections 147 and 332 of the Indian Penal Code, she has received two weeks' imprisonment in each. In her case, I reduce the fine to Rs. 5 or in default to imprisonment for two weeks. In the case of the three youths, Har Lal, Jagram and Kamal Singh, I reduce the fine in each case to a nominal sum of Re. 1 or in default to two weeks' imprisonment. In all other respects the sentences will stand. The fines or the balances of the fines, as the case may be, if paid, will be refunded.

Order modified.

1913
May, 7.

APPELLATE CIVIL.

Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.
THAKUR PRASAD (APPLICANT) v. PANNO LAL AND OTHERS
(OPPOSITE PARTIES).*

Act No. III of 1907 (Provincial Insolvency Act), sections 22, 46 and 52—Act No. IX of 1908 (Indian Limitation Act), section 5—Insolvency—Application to Court to reverse act of receiver—Limitation.

*Held that section 5 of the Indian Limitation Act, 1908, does not apply to applications contemplated by section 22 of the Provincial Insolvency Act, 1907. Distinguish *Hira Lal* (1) distinguished.*

ONR. Thakur Prasad was a secured creditor of an insolvent being a mortgagee in possession. A receiver was appointed by the court, and it appears that on the 20th of September, 1911, the receiver took possession of the mortgaged property. On the 31st of October, 1911, Thakur Prasad applied to the court under section 22 of the Provincial Insolvency Act, 1907, praying that the act of the receiver might be reversed and the applicant restored to possession. The District Judge held that as the application had been made more than twenty-one days after the act complained of, it was time-barred, and accordingly rejected it. The applicant thereupon appealed to the High Court.

Munshi Govind Prasad, for the appellant.

The respondents were not represented.

TUDBALL and MUHAMMAD RAFIQ, JJ :—The facts of the case, out of which this appeal arises, are as follows :—The appellant is a secured creditor of an insolvent. He was a mortgagee in possession. A receiver was appointed by the court, and it appears that on the 20th of September, 1911, he took possession of the property in question. On the 31st of October, 1911, the present appellant made an application under section 22 of the Provincial Insolvency Act to the court asking it to reverse the act of the receiver and to restore him to possession, he being a secured creditor. The learned District Judge held that as the application was made more than twenty-one days after the act complained of had been done, it was time-barred. He accordingly rejected the application. On appeal before us it is urged that the act complained of did not come to the

* First Appeal No. 88 of 1912 from an order of H. E. Holme, District Judge of Allahabad, dated the 9th of March, 1912.

notice of the appellant on the date when it was done or soon after it and the appellant went to the court without delay, and therefore the court ought to have applied section 5 of the Limitation Act and admitted the application. The appellant did not ask the court to admit his application out of time and there is therefore on the record no evidence whatsoever to show that there was sufficient cause for so doing. We therefore remit the following issue to the court below :—"When did the act of the receiver first come to the knowledge of the appellant?" The court will take any evidence offered on the issue by the parties and remit its finding. On receipt of the finding ten days will be allowed for objections.

On the return of the findings the following judgement was delivered :—

The return made by the court below to the issue remitted is that the appellant came to know of the act of the receiver on the 27th of October, 1911, i.e., four days prior to his filing the application of 31st of October, 1911. If section 5 of the Limitation Act (IX of 1908), could apply to the application made by the appellant to the court below, then we should be of opinion that the appellant was entitled to ask the court to exercise the power granted by that section. But, in our opinion, section 5 of the Limitation Act does not apply to applications contemplated by section 22 of the Insolvency Act. Section 5 of the Limitation Act runs as follows :— "Any appeal or application for a review of judgement or for leave to appeal or *any other application to which this section may be made applicable by any enactment or rule for the time being in force* may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period." An application under section 22 of the Insolvency Act to the District Judge is not an appeal, application for review of judgement or for leave to appeal, and it is admitted that there is no rule or enactment under which this section was made applicable to section 22 of the Insolvency Act. Our attention is called to the Full Bench ruling in *Dropadi v. Hira Lal* (1). But that ruling does not help

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(1) (1912) I. L. R., 34 All, 496.

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the appellant. Granting that the general provisions of the Limitation Act apply to the Insolvency Act, the very wording of section 5 limits the applicability of that section to *appeals* and *applications* of a certain character. An application under section 22 of the Insolvency Act does not come in any way within the category of such applications. It is urged that the application to the District Judge against the act of the receiver is really an appeal as is contemplated by section 5 of the Limitation Act. Clause (2) of section 52 of the Insolvency Act is quoted, which runs as follows :—

“ Subject to the appeal to the court provided for by section 22, any order made or act done by the Official Receiver in the exercise of the said powers shall be deemed the order or act of the court.” It seems to us clear that the word ‘ appeal ’ in this clause is not used in the strict legal meaning of the word. The very wording of the section shows this. Section 22 is perfectly clear. The proviso says :—“ Provided that no application under this section shall be entertained after the expiration of twenty-one days from the date of the order or decision complained of.” The right of appeal is given in section 46 of the Act. In our opinion an application under section 22 of the Act against an “ act ” of the receiver is not and cannot be an “ appeal ” such as is contemplated by section 5 of the Limitation Act. It is clear, therefore, that section 5 of the Limitation Act does not apply and the court below was, therefore, bound to reject the application made to it and this appeal must fail. It is dismissed. We make no order as to costs, as the other side is not represented.

Appeal dismissed.

FULL BENCH

1913
May, 9.

Before Sir Henry Richards, Knight, Chief Justice, Mr. Justice Banerji and Mr. Justice Lyle.

SONA DEI AND ANOTHER (PLAINTIFFS) v. FAKIR CHAND AND OTHERS
DEFENDANTS)*

Maha-Brahman—Agreement as to distribution of offerings—Construction of agreement.

The members of a family of Maha-Brahmans entered into an agreement amongst themselves whereby certain members of the family were to take the

*Second Appeal No. 1178 of 1912 from a decree of L. Johnston, District Judge of Meerut, dated the 30th of July, 1912, affirming a decree of Mohan Lal Hukku, Subordinate Judge of Meerut, dated the 10th of May, 1912.

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offerings made on certain days of the month, and the other members of the family the offerings made on the other days.

Held by BANERJI and LYLE, J. J. (RICHARDS, O. J. dissenting) that the effect of such an agreement was that if an offering was made to a member of the family on a day which belonged to the other branch, he was bound to account for it to the branch to which the day belonged.

Per RICHARDS, O. J. Such an agreement as above described would not prevent a person who wished to do so from making a special individual gift to a member of the family even on a day which was appropriated by the agreement to the other branch. *Doorga Pershad v. Bulree*, (1) and *Oochi v. Ulfal* (2) referred to.

THE facts of this case were as follows:—

The parties belonged to a family of Maha-Brahmans. By an arrangement made between the members of the family, the offerings made on certain days in the month were to go to one Nanda, the husband of the plaintiff Sona Dei, while those made on other days were to go to the defendants. Nanda died, leaving the plaintiff as his heir. On the day which fell to the share of the plaintiff one Debi Singh died. Debi Singh's son refused to make the offerings to the widow, as she was a female, and gave property of some value to Fakir Chand, defendant. The plaintiff, thereupon, brought this suit for recovery of the offerings or their value. The defendant pleaded that the gift was a personal gift to Fakir Chand and no suit lay for recovery of such offerings. The courts below sustained this contention and dismissed the suit. The plaintiff appealed to the High Court.

The appeal was argued on the 7th of May, 1913, before RICHARDS, C. J., and LYLE J., and then, upon an order made by the Chief Justice, was re-argued before the present Bench.

The Hon'ble Dr. *Tej Bahadur Sapru* (with him Pandit *Rama Kant Malaviya*) for the appellant:—

The members of the family had made an arrangement by which certain members were to receive the offerings on certain days, and others on other days. The defendant received offerings on the day which was the plaintiff's day. The donor admits that he knew that it was the plaintiff's day and made the gift to the defendant; but the defendant was under an obligation not to accept that gift or, if he did, to make it over to the plaintiff. Having accepted the gift, he must be deemed to have received it for the use and

(1) (1874) 6 N. W. P., H. C. Rep., 189., (191). (2) (1898) I. L. R., 20 All., 284.

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benefit of the plaintiff. The donor could not be compelled to make the gift to the plaintiff, but the defendant, having entered into a contract not to receive the gift on that day, must be deemed to have acted as a trustee for the plaintiff and is bound to make it over to her, who would be in the position of a *cestui qui trust*. The present case is similar to a case where two doctors entered into an agreement that one of them would not treat patients within a certain area. If a patient goes to the doctor who has agreed to refrain from so practising, he will be bound to make over any fee that he may receive to the other doctor. In this case a trust was created, inasmuch as the gift was made (1) on a day which belonged to the plaintiff, (2) in connection with funeral ceremonies, by which the family would have been entitled to benefit, (3) to a man who was bound by the contract. He relied on *Doorga Pershad v. Budree* (1), *Oochi v. Ulfat* (2), *Godefroion Trusts*, 221, 226.

Dr. Satish Chandra Banerji, for the respondents:—

There can be no doubt that the gifts made by Raghbir Narain were voluntary gifts. The plaintiff could not bring a suit for an injunction to restrain the making or receiving of such gifts, against either the donor or the donee. It has been held that there is no legal cause of action to recover such offerings even as against the donee. The other side contends that the defendant, having received the gift on the plaintiff's day, in good conscience ought to make it over to the plaintiff, but there would be no such equity, unless the original contract was that even in cases where the gift was made personally to one individual, the gift would go to the person whose turn it would be to take it. The gift would be *personal*, not because it was handed over to the donee *physically*, but because it was so handed to him *intentionally* by the donor with the object that he alone should take it and nobody else. The object of the partition was, no doubt, to put an end to disputes, but all that the parties had in contemplation was to divide that property only that would or might be divisible. Where the property was given to one member individually it would not be divisible among the parties to

(1) (1874) 6 N.-W. P., H. O. Rep. (2) (1898) I. L. R., 20 All., 234.
189, (191).

decision of the court below was erroneous, and I would allow the

appeal.

BANERJI, J.—I regret I cannot agree with the learned Chief Justice, which he has arrived at fully.

BANERJI, J.—I regret I cannot agree with the learned Chief Justice in the conclusion at which he has arrived. I fully agree with him that the whole case turns upon the nature of the contract, a breach of which is the foundation of the plaintiff's suit, and that the contract was made by Bagnair Narain Singh.

and also on the nature of the gift made by Raghubir Narain Singh on the occasion of his father's death. It is alleged in the plaint that Dhan Singh, the ancestor of the family, was the Maha-Brahman of the particular village in question and that offerings made to this family of Maha-Brahmans were offerings to the members of the family as such. In order to prevent disputes between the members of the family as to the division of the offerings, they entered into an arrangement by which individual members of the family were to

take offerings given on certain dates, but it seems to me from the nature of the offerings which, according to the plaintiff's own case, were agreed to be divided, that the offerings which were to be divided were the offerings made to individual members of the family as such members and not offerings made personally to individual Maha-Brahmans who were members of the family. If the contract between the parties was that they were to divide the offerings given on a particular date to any member of the family, whether as representing the family, or in his individual capacity as a Maha-Brahman, the plaintiff would of course be entitled to the offerings received on the particular day which was the day on which her turn for receiving offerings accrued. In the present case neither of the courts below has found that the contract between the parties was of the wide nature just now mentioned, and as I have already said, it was not the plaintiff's own case, as laid in the plaint.

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If then the contract related to offerings made to the family as such, any present made to an individual member of the family in his personal capacity would not fall within the scope of the contract. In the present case, according to the evidence of Raghubir Narain Singh and according to the findings of both the courts below, the present made by him was a present individually to Rakir, defendant, and the donor distinctly stated at the time of the gift, that the offerings

not to go to a female member of the family. It is clear from his evidence, which I think has been rightly interpreted by the court below, that the offerings in question were made to Rakir in his individual capacity, and not as representing the Maha-Brahman family of which the parties were members. That being so, I think the plaintiff is not entitled to the offerings claimed and her suit has been rightly dismissed. I would dismiss the appeal.

LYTIE, J.—I concur with the judgement of Mr. Justice Banerji.

There can be no doubt that where there is an agreement among Maha-Brahmans, that offerings shall be taken by a particular man on a particular day, the agreement is one which will be enforced in law. But in the absence of any special stipulation, such an agreement can only refer to offerings made to the general body or to the whole family, as the case may be, of Maha-Brahmans. Where a client wishes to benefit a particular Maha-Brahman by making him a special gift, there is nothing to prevent his doing so, and in such a case no other Maha-Brahman can claim any share in the gift. It seems to me as clear as possible in this case that it was the deliberate wish of the donor not only to benefit the defendant but to exclude the plaintiff. I do not think it is necessary to consider what the motives were that animated him. It is sufficient to say that he knew that if the gift were made to the whole family the plaintiff might get a share of it. Not wishing that she should, he deliberately elected to make the gift, not to the whole family, but to the defendant individually. No doubt the gift was what might be called a funeral gift, but it was open to anyone to make a funeral gift either to a family of Maha-Brahmans, or to an individual Maha-Brahman as he might wish. In this case, I think, he made his offering to an individual Maha-Brahman, and the plaintiff is, therefore, not entitled to any share. I would, therefore, affirm the decrees of the lower courts and dismiss the appeal.

By THE COURT.—The order of the Court is that the appeal is dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL.

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May, 13.*Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Lytle.*

SIDHESWARI PRASAD NARAIN SINGH AND ANOTHER (PLAINTIFFS)

v. GOSHAIN MAYANAND AND OTHERS (DEFENDANTS).*

Civil Procedure Code (1882), section 315—Execution of decree—Sale in execution—Auction purchaser deprived of property purchased owing to failure of judgment-debtor's title—Suit to recover purchase money—Limitation—Act No. IX of 1908 (*Indian Limitation Act*), schedule I, articles 62 and 120.

Held (1) that an auction purchaser seeking to recover the purchase money paid by him upon the ground that he has been deprived of the property purchased owing to failure of the judgment-debtor's title thereto has no right outside the Code of Civil Procedure, and (2) that the remedy given by the Code of Civil Procedure is not a suit for money had and received, to which article 62 of the first schedule of the Indian Limitation Act, 1908, would apply, but is a suit falling within the purview of article 120. *Munna Singh v. Gajadhar Singh* (1), and *Mohiudeen Ibrahim v. Mahomed Mura Lewat* (2) followed. *Ram Kumar Shaha v. Ram Gour Shaha* (3) not followed. *Hannuman Kanhai v. Hannuman Mandur* (4) distinguished.

THE facts of this case were as follows :—

In execution of a decree passed against certain persons the house property of the judgment-debtors was sold on the 18th of March, 1907. The plaintiffs purchased the property for Rs. 15,200. There being other decrees against the same judgment-debtors, the decree-holders in those cases applied for rateable distribution of the assets, which consisted of Rs. 15,200 paid by the plaintiffs. The money was distributed as prayed. One Ram Prasad Singh brought a suit against the plaintiffs for a declaration that the property sold was his and the judgment-debtors had no saleable interest in it and he prayed for setting aside the sale. The High Court on appeal affirmed that decree on the 22nd of November, 1909. The plaintiffs brought the present suit on the 12th of September, 1910, for a refund of the purchase money against the defendants who had received shares in the distribution of the Rs. 15,200. The court below held that the suit was filed beyond three years from the date of the distribution of assets and was barred by limitation. The plaintiffs appealed to the High Court.

* First Appeal No. 41 of 1912 from a decree of Sirish Chandra Basu, Subordinate Judge of Benares, dated the 16th of November, 1911.
(1) (1883) I. L. R., 5 All., 577.
(3) (1909) 13 C. W. N., 1080.
(2) (1912) 23 M. L. J., 487.
(4) (1891) I. L. R., 19 Calo., 123.

The Hon'ble Dr. Sundar Lal (with him Pandit Bray Nath

Vyas), for the appellant :—

Sections 313 and 315 of the Code of Civil Procedure, 1882, lay down that if the judgement-debtor has no saleable interest, the auction-purchaser is entitled to a refund of his purchase money. This right is expressly given by statute, but the question at one time was whether that remedy was the only remedy or the auction-purchaser could get a refund by means of a regular suit too. There is no doubt that the money can be recovered by suit—*Munna Singh v. Gajadhar Singh* (1)—and that from the persons who have received shares in the distribution of assets; *Kishan Lal v. Muhammad Safdar Ali Khan* (2). The case of *Gurshi-dawa v. Gangaya* (3) settles the point as to when the cause of action arose. The judgement-debtor had no saleable interest, and the purchaser had a right to recover what he had paid. The Act of 1859 gave no guarantee to the purchaser. He took everything or nothing. The Act of 1882 guaranteed the existence of some saleable interest at least of the judgement-debtor in the property, the failure of which guarantees a right of action. No period is provided for suits like these by any special article of the Limitation Act. So article 120 of the Limitation Act would apply.

[The Hon'ble Pandit Moti Lal Nehru, for the respondents, mentioned that the sections 313 to 315 were not in force at the date of this suit, the law in force being the Act of 1908, order XXI, rule 92.]

The sale took place under the Code of 1882 on the 18th of March, 1907, and the sale proceeds were divided in July, 1907. Under the General Clauses Act (X of 1897), section 6 (c), the right acquired while the old Act was in force is not affected by the new Code. As to limitation. There are cases supporting both views, one set of cases holds that the omnibus article 120 applies to a suit like this, while others hold that article 97 applies. I submit that article 120 is applicable, but even if article 97 applies the suit has been brought within three years of the failure of consideration;

(1) (1883) I. L. R., 5 All., 577. (2) (1891) I. L. R., 13 All., 383. (3) (1897) I. L. R., 22 Bom., 783.

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Mohiudeen Ibrahim v. Mahomed Muwa Lewai (1) and *Nilakanta v. Imam Sahib* (2) hold article 120 to be applicable. *Gurshidawa v. Gangaya* (3) mentions no article, but holds that the cause of action arises when the purchaser is deprived of the property sold. The Hon'ble Pandit *Moti Lal Nehru* (with him The Hon'ble Dr. Tej Bahadur Sanyal, Maulvi *Ghulam Mujtaba*, The Hon'ble *Munshi Gokul Prasad*, *Munshi Gulzar Lal*, *Maulvi Aluhammad Ishtaq* and *Munshi Kalindi Prasad*), for the respondents:—

The right to bring a suit like this is a right which is independent of section 315. If you take the right to be the creation of statute, then the remedy given by the statute should be applied. The Code contemplates an application to the Court executing the decree. The suit is therefore not maintainable under the Code. I submit that the right to bring the suit is a right independent of section 315, a general right, and under section 11 of the Code of 1882 a suit is maintainable. I rely on *Hari Doyal v. Sheikh Samsuddin* (4), *Nityanand Roy v. Jugat Chandra Gula* (5) and *Dorab Ally Khan v. Abdool Azees* (6). Section 315 only provides a summary remedy; *Kishun Lal v. Muhammed Saifdar Ali* (7). This is a suit for relief on the ground of total failure of consideration from the beginning, and article 62 of the Limitation Act will apply. He further cited *Bhawanji Kaur v. Rishi Ram* (8) and *Hannuman Kamat v. Hannuman Mandur* (9). The last case was of a sale of a member's interest in a joint family which could not be sold. The case is in point. There too the sale failed as the vendor had no saleable interest. The same principle applies here; *Ram Kumar Shaha v. Ram Gowr Shaha* (10). If the judgment-debtor had no saleable interest, there was a failure of consideration from the beginning. It is, however, a suit for money had and received. The right arises out of the Statute, but the form is not prescribed by it. My second point is that the remedy is not available against my clients, who have only received shares in the distribution of assets. They are neither the judgment-debtors nor were they parties to the suit to set aside the sale. The first essential for a suit under

- (1) (1912) 23 M. L. J., 487.
- (2) (1892) I. L. R., 16 Mad., 361.
- (3) (1897) I. L. R., 22 Bom., 783.
- (4) (1900) 5 C. W. N., 240.
- (5) (1902) 7 C. W. N., 105, 107.

- (6) (1878) I. R., 5 I. A., 116.
- (7) (1891) I. L. R., 13 All., 388.
- (8) (1879) I. L. R., 2 All., 354.
- (9) (1891) I. L. R., 19 Cal., 128.
- (10) (1909) 13 C. W. N., 1080.

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section 315 is that it must be "found" that the judgment-debtor had no saleable interest. I submit that it must be found by the Court against those against whom the claim is made; *Vithoba v. Esat* (1).

RICHARDS, C. J. and LYLE, J.—This appeal arises out of a suit in which the plaintiffs claimed to recover a sum of Rs. 15,200 in certain proportionate shares from the several defendants. The suit has been dismissed by the court below as being barred by limitation. The facts, for the purposes of the present appeal, may be taken as admitted. A decree-holder of the name of Maynand Gir caused certain property to be put to sale in order to realize the amount of a decree. The property was sold and purchased by the plaintiffs. An objection was taken on the part of a claimant to the property in the execution proceedings, but the objection was disallowed with the result that the purchase in favour of the present plaintiff was confirmed on the 20th of May, 1907. The proceeds of the sale were paid into court and were distributed amongst the persons who held decrees against the judgment-debtor of Maynand Gir. Its distribution took place on the 1st of July, 1907. Subsequently the claimant to the property brought a regular suit to which he made the present plaintiffs parties and also Maynand Gir. That suit was decreed by the court of first instance on the 11th of September, 1907, and after various hearings was confirmed by the High Court on the 22nd of November, 1909. The plaintiffs instituted the present suit on the 12th of September, 1910, claiming to get back the purchase money as already mentioned. The court below, holding that the suit was one for "money had and received" by the defendants for the use of the plaintiffs, dismissed the plaintiffs' suit as being barred by limitation on the ground that article 62 applied and that time began to run from the 1st of July, 1907, when the decree-holders received the money.

The plaintiffs come here in appeal contending that the decision of the court below was wrong. It seems to us that, apart from the Code of Civil Procedure, the plaintiffs in the present case would have no right to recover back the purchase money they paid merely on the ground that the judgment-debtor's title had

proved defective. This seems to have been the view taken by STRAIGHT, J., when referring a question to the Full Bench in the case of *Munna Singh v. Gayadhar Singh* (1). The learned Judge, after referring to a number of rulings, says:—"By all these decisions it seems to have been recognized as an established principle of law, that a purchaser at a sale in execution of decree cannot recover his purchase money, if it turns out that the judgment-debtors, whose immovable property he has purchased, had no saleable interest." When the case came before the Full Bench this view of the law seems to have been accepted. The learned Chief Justice refers to section 315 of the Code of Civil Procedure, then in force, as being the foundation of the plaintiffs' right, in that case, to get a return of his purchase-money. This also seems to have been the view taken by NAPIER, J., in the case of *Mohiudeen Ibrahim v. Mahomed Mura Lewai* (2). At page 489 the learned Judge says:—"It has been laid down by the Privy Council in *Dorab Ali Khan v. The Executors of Khayun Mohe-oodeen*, that as in India movable and immovable property are alike capable of being seized and sold under the writ of *fiere facias*, the responsibility of the sheriff in respect of sales here is governed by the law relating to chattels rather than by that relating to the sale of real property. It is clear that where the property seized was personal estate and it was sold by the sheriff, no suit lay either against the sheriff or the judgment-creditor, who had received the purchase money, to recover it when the property had been recovered from the purchaser by a person claiming title, the principle being that a sale by the sheriff was not a sale in market overt, the purchaser acquiring thereby only what the judgment-creditor had a right to sell, namely, the precise interest, and no more, which the judgment-debtor possessed in the goods, and that there was no warranty of title implied in a sale by the sheriff." We agree that outside the provisions of the Code of Civil Procedure, to which we shall presently refer, an auction-purchaser has no right to recover back the purchase money merely by showing that the judgment-debtor had no saleable interest.

The real reason is that in a sale by the court or its officer, there is no warranty of title, and the money which the purchaser pays

cannot, either in law or equity, be said to have been received by the court, its officer, or the creditors for the use of the auction-purchaser. We, therefore, think that, assuming that the plaintiffs had any cause of action, their cause of action was to enforce the right which was given to them by sections 313 to 316 of the Code of Civil Procedure of 1882 (which admittedly was in force at the time of the sale and distribution of the purchase money in the present case). Section 315 provides, amongst other things, that when it is found that the judgment-debtor had no saleable interest in the property which purported to be sold and the purchaser is for that reason deprived of it, the purchaser shall be entitled to receive back his purchase money from any person to whom the purchase money has been paid.

There is an alteration in the present Code which we need not consider for the reason mentioned above. The plaintiffs' right is regulated in the present suit by the provisions of the Code of 1882. In the Full Bench case to which we have already referred, viz. *Munna Singh v. Gayadhar Singh* (1), it was unanimously decided that an auction-purchaser was entitled to bring a suit to recover back his purchase money, when it was found that the judgment-debtor had no saleable interest. It seems to us quite clear that this is a form of suit for which there is no special provision in the Limitation Act. We have already pointed out how, in our opinion, it cannot be said to be a suit for money had and received. We, therefore, think that article 120 applies and it is admitted that if this is the proper article the suit is within time. The learned advocate on behalf of the respondents urges that even if it be held that the plaintiffs' right in the present case is a right under the statutory provisions of the Code of Civil Procedure of 1882, the suit is nevertheless a suit for money had and received by the defendants for the use of the plaintiffs, and he quotes, in support of this contention, the case of *Ram Kumar Shaha v. Ram Gour Shaha* (2). The learned Judges, in deciding that case referred to the case of *Hannuman Kamat v. Hannuman Murdur* (3), and say as follows, at page 1083:—"We are unable to distinguish this case in principle from the case before us." With

(1) (1883) I. L. R., 5 All., 577. (2) (1909) 13 O. W. N., 1080. (3) (1891) I. L. R., 19 Cal., 128.

great respect to the learned Judges we think that the cases were

distinguishable. In *Hanuman Kamaal v. Hanuman Mandur* (1)

the money was sought to be recovered on the ground that there

had been a failure of consideration in the case of a private sale,

whilst the case before the learned Judges in *Ram Kumar Shaha*

v. Ram Gour Shaha (2) was a case, like the present one, in which

an auction-purchaser sought to recover his purchase money on the

ground that the judgment-debtor had no saleable interest. As

against the authority of this case we have the case, already referred

to, of *Mohiudeen Ibrahim v. Mahomed Mura Lewai* (3), in

which the learned Judges expressly decided that article 120 was

the article applicable to a suit in which an auction-purchaser sought

to recover the purchase money on the ground that the judgment-

debtor had no saleable interest.

Under these circumstances, we think that the appeal should be

allowed and the case remanded. We accordingly allow the appeal,

set aside the decree of the court below and remand the case with

directions to readmit the suit under its original number in the file

and proceed to determine the same according to law. Costs here-

tofore will be in the discretion of the court disposing of the suit.

Appeal allowed and case remanded.

Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

LACHMI NARAIN ALIAS MUNNUJI (PLAINTIFF) *v.* RAM GHARAN

-DAS AND OTHERS (DEFENDANTS).*

Civil Procedure Code (1908), order XXXIX, rule 1; order XLIII, rule 1—

Injunction—Order refusing injunction—Appeal.

Held that an appeal lies from an order refusing, as well as from one granting,

a temporary injunction.

THE facts of this case were as follows:—

Two decrees were obtained against one Musammat Dropadi,

in execution of which certain property was attached. Lachmi

Narain objected to the attachment and sale of that property on

the ground that it belonged to him and not to the judgment-debtor.

His objection was disallowed and he then brought a suit to establish

his right. In the course of that suit he applied for a temporary

* First Appeal No. 25 of 1913, from an order of Gurn Prasad Dube,

Subordinate Judge of Allahabad, dated the 19th of November, 1912.

(1) (1891) I. L. R., 19 Cal., 123.

(2) (1909) 13 G. W. N., 1080.

(3) (1912) 23 M. L. J., 487.

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RAFIQ, JJ.—This is an appeal
from an order passed by the court below under order XXXIX, rule
1, of the Code of Civil Procedure. Two decrees were obtained
against one Musammad Rafiq, in execution of which certain
property was attached. Lachmi Narain objected to the attachment
and sale of that property on the ground that it belonged to him
and not to the judgment-debtor. His objection was disallowed
and he then brought a suit to establish his right. In the course of
that suit he applied for a temporary injunction to restrain the
defendant decree-holder from putting the property to sale. The
lower court has refused the application, merely remarking that the
applicant can deposit the decree money. A preliminary objection
is taken that no appeal lies from the order. It is contended that
order XLIII, rule 1, clause (v), merely relates to an order granting
an injunction, but not to an order refusing to grant an injunction.
In our opinion, an order refusing as well as one granting an
injunction is an order passed under that rule and the language of
that rule covers both classes of orders. There is no force in the
preliminary objection. As regards the merits, the application is
not strongly opposed and, in the circumstances of the case, the
injunction ought to have been granted by the court below. We
allow the appeal, set aside the order of the court below and grant
a temporary injunction restraining the sale pending the final
decision of the suit. Costs in the present matter will abide the
event.

Mr. M. T. Aggarwal, for the appellant.

The Hon'ble Dr. Sunder Lal, for the respondents.

injunction to restrain the defendant decree-holder from putting
the property to sale. The lower court refused the application,
merely remarking that the applicant could deposit the decree
money. The plaintiff appealed to the High Court, where a
preliminary objection was raised by the respondents that the
appeal did not lie.

Appeal allowed.

Before Mr. Justice Tubbail and Mr. Justice Muhammad Rafiq.

WAHID-UN-NISSA AND OTHERS (DEFENDANTS) v. KUNDAN LAL AND

ANOTHER (PLAINTIFFS).*

Civil Procedure Code (1908), order XLI, rule 23; order XLIII, rule 1(u) —

Suit dismissed for default of appearance, but restored by appellate court —

Remand—Appeal.

Held that no appeal would lie from an appellate order directing that a suit, which had been dismissed because neither party had appeared, should be restored to the file of pending cases and heard.

In this case the plaintiffs' suit was dismissed because neither party appeared. The plaintiff, without applying for the restoration of the case, appealed against the decree to the District Judge. The District Judge allowed the appeal and remanded the case for decision on the merits. Against this order the defendants appealed to the High Court, and at the hearing a preliminary objection was taken that no appeal lay.

Pandit Baldeo Ram Dave (for The Honble Dr. Sundar Lal), for the respondents, raised a preliminary objection to the hearing of the appeal on the ground that no appeal lay from the order. The appeal purports to have been filed under clause (u) of order XLIII, rule 1, from an order supposed to have been made under order XLI, rule 23. The order appealed against has not been made under rule 23, order XLI. Rule 23 contemplates a case in which the court of first instance disposes of a suit upon a preliminary point and passes a "decree" and the "decree" is reversed on appeal. No "decree" has been made in this case by the court of first instance and the case has not been decided on a preliminary point. The "order" made by the court of first instance is not a "decree." In such cases there is no appeal from the appellate decree of the court. If the appeal had been dismissed by the District Judge, no second appeal would have lain to this Court. The law did not contemplate an appeal where the appeal was allowed by the District Judge.

Mr. Nihal Chand (for Dr. S. M. Suliman), for the appellant: An appeal is allowed from an order of remand. Here an order of remand was passed and an appeal can be entertained. The court below had no jurisdiction to pass the order that it did.

* First Appeal No. 28 of 1913, from an order of Austin Kendall, District Judge of Cawnpore, dated the 2nd of January, 1913.

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transaction. A fraud was effected by the executant on the family, and the members of the family could not be bound by the fraud of the ancestor. They are bound by his acts only so far as they are family transactions.

The Hon'ble Dr. Sundar Lal, for the respondent:—

The suit of Karyā Pande, to set aside the mortgage, was a suit on behalf of the family, and although the other members of the family were not parties to it in name, to all intents and purposes they must be taken to be parties to it. The court below having found that the father was suing on behalf of the family as its head, it must be presumed that every member of the family was suing and that therefore the compromise was entered into on behalf of the family. There is no suggestion that there is anything fraudulent in the entering into the compromise. It was a compromise in doubtful rights. The question is not as to the liability of the so to pay their father's debt but of paying debts under the compromise to which the defendants were themselves parties.

Munshi Iswar Sarm was heard in reply.

RYES and LYLE JJ:—Karyā Pande and Musammāt Aurē

Parain, his sister-in-law, executed an usufructuary mortgage the zamindari share entered in their names, on the 13th of May 1905, in favour of the plaintiff, for Rs. 1,799. It was agreed that the mortgagee should take the usufruct in lieu of interest and that the mortgage should be redeemed on payment of the mortgage money after a period of four years in any *Baisakh*. It is unnecessary to recapitulate the further covenants in the bond. In 1906 the mortgagees brought a suit against the mortgagee to cancel the mortgage on the ground that it was merely a paper transaction and no consideration passed. Karyā Pande expressly brought the suit in his capacity of manager of a joint Hindu family. It was unnecessary to consider whether such a suit could have been maintained. The parties, however, arrived at a compromise terms of which were that the amount then due on the mortgage which was about Rs. 2,500, should be reduced to Rs. 1,200 that the mortgage be redeemable in two years. A decree was passed in terms of the compromise, dated the 23rd of May, 1906. The mortgage was due on the mortgage

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age and decree, on the ground that she had been wrongly assessed by the defendants. Kanya Pande is dead and the defendants are his grandsons and great grandsons and Musammata Pamin. The main defence to the suit was that the mortgage of 1905 was a fraudulent transaction entered into to defeat the creditors, and in particular, one Harpal Pande, Harpal Pande held a mortgage on some other property of Kanya Pande, in execution of a decree on his mortgage he sold the mortgaged property. As the proceeds of the sale were insufficient to satisfy the decree, he applied on the 28th of March, 1900, for a decree under section 90 of the Transfer of Property Act, to recover the balance of the decretal money. This mortgage in suit, it is said, was executed on the 13th of May, 1905, to defeat his claims. It is also pleaded that the suit and compromise of the 23rd of May, 1905, were collusive and therefore ineffectual, and, in any event, not bind the defendants other than Musammata Pamin. The first court dismissed the suit on the ground that the mortgage of 1905 was entirely fraudulent and was a mere paper transaction fraudulently entered into to defeat the creditors of the estate. On appeal the lower court upheld this finding, but came to the conclusion that the compromise in 1907 was perfectly genuine and was not entered into because Kanya Pande was afraid that his suit would be dismissed. As the suit was instituted by him in a representative capacity as head of the family, the whole family, including minors, were bound by his act. It further found that the compromise was for the benefit of the family, and decreed the suit. In second appeal it has been argued on behalf of the defendants appellants that on the finding that the original mortgage was made without consideration, no money passed consequently there was no debt due from Kanya Pande, and therefore, there was no pious duty on the part of the sons and grandsons involved in the matter, and, secondly, a compromise, which purported to modify a mere paper transaction, could create no liability.

In our opinion, this ingenious argument has no force, and we think that on the finding that the compromise was not collusive, it was genuine and made to benefit the family, the courts were

not entitled to go into the question as to whether the original mortgage was or was not fictitious.

According to the Full Bench ruling in *Madan Lal v. Krishan Singh* (1), the whole family, including the minors, were bound by the decree. But even assuming that it was open to the defendants appellants to re-open the question as to the validity of the original mortgage, and even assuming that the finding of the lower courts as to its nature is correct, the original mortgageors sued in 1907 to get rid of the danger to the family which their own fraudulent conduct had created. It is true that the mortgagee was equally fraudulent, but she was nevertheless entitled to maintain her possession. *In pari delicto melior est positio defendantis*. If the court had decided the case on this principle, the suit would have been dismissed and it would have been *res judicata* between the parties that there was a mortgage legally enforced against the defendants appellants for an amount, then approximately, Rs. 2,500. In order to minimize the liability of the family, the mortgageors were probably well advised to make the best terms they could and compromise the case. Even if there was no loan nor debt in the beginning, this decree created a debt for which there was good consideration, which the sons and grandsons are bound to discharge. We, therefore, dismiss the appeal with costs.

Appeal dismissed.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Banerji.

BHAGWANT SINGH (PLAINTIFF) v. BHOLO SINGH (DEFENDANT).

Act No. IX of 1903 (Indian Limitation Act), schedule I, articles 138 and 141—Execution of decree—Successive purchasers of same property—Suit by subsequent purchaser to recover from earlier purchaser—Limitation.

Article 138 of the Limitation Act only applies to suits in which the auction purchaser is the plaintiff and the judgment-debtor, or some one claiming through him, is the defendant.

Ram Lakhan Rai v. Gajdhar Rai (2) and *Khivoda Kantia Roy v. Krishna Das Laha* (3) referred to.

This was an appeal under section 10 of the Letters Patent from the judgment of a single judge of the Court. The facts of the

* Appeal No. 81 of 1913 under section 10 of the Letters Patent.
(1) 1913) I. L. R., 34 All., 573. (2) 1910) I. L. R., 38 All., 224.
(3) 1910) 13 O. L. J., 878.

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case are stated in the judgement under appeal, which was as

follows:—

"This was a suit for recovery of possession over certain immovable property, and the only question for determination before me is one of limitation. In stating this question, I think it reasonable to accept everything which the courts below have found against the conduct of the defendant upon the facts of the case. It appears that the defendant, holding three distinct mortgages on the property in suit, brought three distinct suits, one upon each mortgage. He obtained decrees and put the property up for sale three times, once upon each decree. He purchased himself at auction under two of his decrees on the 21st of February, 1898, and obtained formal possession on the 7th of September, 1898, and again on the 30th of January, 1899. In the mean time the same property had been put up for sale a third time on the 21st of April, 1898. The defendant appeared at that auction sale, said nothing about his previous purchases, but actually bid for the property as if it still belonged to his judgment-debtor. He was out-bid by the plaintiff, who thus became auction-purchaser at this third sale held on the 21st of April, 1898. This sale was confirmed by the court on 30th of May, 1898, and the plaintiff obtained formal delivery of possession on the 15th of May, 1899. It must be remembered, therefore, that his judgment-debtor was still in possession at the date of the auction sale, but the decree-holder (the present defendant), as auction purchaser under his first two decrees, had himself obtained formal delivery of possession before the plaintiff did so. The present suit was brought on the first of June, 1910, and I have to determine which is the article of the first schedule to the Indian Limitation Act (Act IX of 1908), by which that suit is governed. The suit as brought is one to which article 142 of the said schedule would apply, provided the plaintiff succeeded in establishing the necessary facts. What the plaintiff says is that he obtained actual and not merely formal possession on the 15th of May, 1899, but lost that possession some time in the month of July, 1899, owing to an adverse decision of the Revenue Courts. If these facts were established, the suit would be one for possession of immovable property when the plaintiff while in possession of the property, had been dispossessed; article 142 of the Indian Limitation Act would apply; the date of the origin of the cause of action would be the month of July, 1899, and the suit would be within time. In such a suit, however, the burden of proof is on the plaintiff to satisfy the court that he was actually in possession within limitation. There is no finding in favour of the plaintiff by either of the courts below on this point, nor has either of them applied article 142 of the schedule, nor has either of them calculated the origin of the cause of action from the month of July, 1899. Both the courts below have held that the plaintiff has a cause of action dating from the 15th of May, 1899, the date on which formal delivery of possession to him took place under orders of the court. The learned Munsif himself does not expressly state what article of the Limitation Act he proposes to apply; but the learned Subordinate Judge on first appeal has expressly applied article 144. This article cannot be applied unless the court is prepared to find that the suit is one for possession of immovable property not especially provided for under

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any of the other articles of the schedule in question. This seems to me clearly impossible, because the suit as framed is one to which article 142 would apply; and it discloses facts which would make article 138 of the schedule applicable. The courts below have held that article 138 of the schedule is excluded by the principle of the ruling of this court in *Narain Das v. Talia Prasad* (1). That ruling obviously does not exclude article 138, because the particular case then before the Court was decided without any determination of the question whether article 138 or article 144 would have been applied to the facts then before the Court. By implication it seems to me that this ruling is entirely against the plaintiff; but I will refer to this point again presently. There are other authorities for holding that article 138 of the schedule would apply to the present suit, as for instance, cases reported in I. L. R., 35 Bom., 452, and in I. L. R., 17 Mad., 89. I come back, therefore, to what seems to me the one question really arguable, namely, whether or not the courts below should have found in favour of the plaintiff on the ground that he has made out a sufficient case for applying the article of Limitation Act on which his suit was actually based, namely, article 142. I do not think the case for the plaintiff can be put any higher than this, namely, that the court should accept his certificate of formal delivery of possession on the 15th of May, 1899, as *prima facie* sufficient proof that he obtained actual possession on that date. If this proposition can be affirmed, then it would not be necessary for the plaintiff to prove that he actually lost possession in the month of July following, or on any specific date; he could claim to have made out a good title, plus possession within twelve years of the date of the suit. Now it is on this very point that the ruling in *Weekly Notes*, 1899, already referred to, seems to me against the plaintiff. Applying the principle involved in that ruling to the facts of the present case, I hold that if the judgment-debtor had been in actual possession on the 15th of May, 1899, then the court would have been bound to accept the plaintiff's certificate as sufficient proof that the judgment-debtor was actually ousted from possession on that date, and that possession passed to the plaintiff. The case is otherwise when the judgment-debtor was not in possession on the 15th of May, 1899, but another person was in possession as auction-purchaser under a previous sale. As against such auction-purchaser, formal delivery of possession to the present plaintiff is not proof that he was actually ousted. Something has been said before me in argument as to the dishonesty of defendants' proceedings, and as to the question of estoppel. The considerations are quite irrelevant to the question of limitation. If the plaintiff had come into court within twelve years of the date of the confirmation of his auction sale, it may be that the courts below are perfectly right in holding that no sort of defence on the merits would have been open to the defendant, in view of his proceedings, and particularly in view of the fact that he was a bidder at the auction sale of the 21st of April, 1898. The whole point of the law of limitation is, however, that a defendant cannot be put to the defence of his title at all unless the plaintiff claims from the courts the relief to which he is entitled within what the Legislature has laid down to be a suitable time with reference to the facts of each particular case. I hold that the suit as framed is barred by article 142 of the

first schedule to the Indian Limitation Act, because the plaintiff has failed to prove the ingredients necessary to bring his suit under the operation of that article. I hold that the facts disclosed are such that the suit would have been maintainable under article 138 of the same schedule if it had been filed two days earlier, but that it is barred under that article, because it was brought more than twelve years from the date of the confirmation of the auction sale. I hold that article 144 of the same schedule cannot be applied at all, because from any point of view the suit is one provided for by another article in the same schedule. I, therefore, accept this appeal, and setting aside the decrees of both the courts below, dismiss the suit with costs throughout."

Randit Uma Shankar Bajpai, for the appellant.

Babu Damodar Das, for the respondent.

RICHARDS, C. J., and BANERJI, J.—The facts out of which this appeal arises are a little peculiar. It appears that the defendant obtained three mortgage decrees on foot of three separate mortgages against the property which the plaintiff now seeks to recover. There were three separate sales. The defendant himself purchased at two of the sales. He bid at the third sale, but he was out-bid by the plaintiff, and the plaintiff was accordingly declared the auction-purchaser. The sale to the defendant was on the 21st of February, 1898; that to the plaintiff was on the 21st of April, 1898. The defendant obtained either formal or actual possession on the 7th of November, 1898. The sale to the plaintiff was confirmed on the 30th of May, 1899. The present suit was not instituted until the 1st of June, 1910. In any view of the case, the plaintiff slept on his rights for nearly twelve years. The only question which had to be decided was one of limitation. It has been urged with great force in the present Letters Patent Appeal that article 144 of the Limitation Act is the article which should regulate the present suit. The learned Judge of this Court, in his decision against which the present Letters Patent Appeal has been preferred, held that article 138 applied. It is quite true that the plaintiff's suit is based on an auction-purchase in execution of a decree; it is also true that at the date of the sale to the plaintiff the judgment-debtor was in possession. At first sight it would appear as if article 138 applied. We are, however, inclined to think that article 138 only applies to suits in which the auction-purchaser is plaintiff, and the judgment-debtor, or some person claiming through

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him, is defendant. [See *Ram Lakham Rai v. Gajadhar Rai* (1) and also *Khiroda Kanta Roy v. Krishna Das Taha* (2). The respondent meets this argument by saying that even assuming that article 144 is the article which applies to the circumstances of the present case, it has been found that he claims through the judgment-debtor and that therefore he is entitled to add to his own possession the possession of the judgment-debtor from the 30th of May, 1898. It is clear that if the defendant is so entitled to add this period, the claim would be time-barred. It is true the defendant claims through the judgment-debtor. He was an auction-purchaser of the judgment-debtor's interest and is in possession as such. It is, however, contended on behalf of the plaintiff, that having regard to the fact that the defendant allowed the property to be put up to sale a third time and bid at the sale himself, he ought not to be allowed to say that he claims through the judgment-debtor. Both the court of first instance and the lower appellate court placed considerable weight on the fact that the defendant bid at the auction sale at which the plaintiff was declared the purchaser. But no issue was framed as to whether or not the defendant is estopped from setting up the case that he claims through the judgment-debtor. It has not been explained how it was that the property came to be put up to sale on foot of each of the decrees, nor has it been shown how far the defendant was responsible for the property being so put up. All the decrees appear to have been put into execution about the same time, and it may have been that the court executing the decree was as much, or more, to blame than the defendant, in allowing the same property to be sold three times. Furthermore, it has not been found that the plaintiff was ignorant of the fact that two months before his purchase the property had been already sold and purchased by the defendant. If he knew all these facts it could hardly be said that he was misled by the fact that the defendant bid at the last auction sale. We think that before finally disposing of the appeal we should have a clear finding on this issue of estoppel. We therefore refer, under order XLI, rule 25, the following issue:—

"Did the defendant by his act intentionally cause the plaintiff to believe that he did not already purchase the property himself, and that the property could be sold and a good title given under the decree in execution of which the property was sold to the plaintiff?"

In considering this issue the court will bear in mind the importance of the knowledge of the plaintiff of what had previously occurred. The court will take such additional evidence as the parties may adduce, relevant to the above issue. On receipt of the finding ten days will be allowed for filing objections. On return of the finding the appeal was dismissed.

Appeal dismissed.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Lyle.
MEGH RAJ AND ANOTHER (DEFENDANTS) v. MATHURA DAS AND OTHERS

(PLAINTIFFS) AND SHIB SINGH AND OTHERS (DEFENDANTS).
Act No. IX of 1908 (Indian Limitation Act), section 19—Limitation—Acknowledgment—*ment—Requisites for valid acknowledgment.*

Held that an acknowledgment of a debt to be a valid acknowledgment within the meaning of section 19 of the Indian Limitation Act, 1908, need not be addressed to the creditor, but may be made to some other person, as, e.g., by means of a deposition in court.

Held also that a statement in the form "the whole of Janki Prasad's mortgage money is owing," there being in existence at the time two mortgages held by Janki Prasad, must be taken to apply to both, in the absence of evidence indicating a different signification. *Mamram Seth v. Seth Ruchand* (1) and *Mylapore Igaswamy Vyaspoori Moolliar v. Veo Kay* (2) referred to.

THIS was a suit on a mortgage bond, dated the 24th of January, 1892. It was executed by Shib Singh and Ajit Singh, two brothers, in favour of Janki Prasad, who was a member of a joint Hindu family. The bond was executed for Rs. 1,200. Defendants 12 to 14 were subsequent transferees of the property. The suit was instituted on the 9th of July, 1910, against the executors and their sons and grandsons. But the subsequent transferees were not impleaded till the 14th of July, 1911, the application for bringing them on the record having been put in on some day in the preceding February. The transferees pleaded that the suit was barred against them, they having been impleaded long after the period

*First Appeal No. 83 of 1912 from a decree of Gokul Prasad, Subordinate Judge of Shahjahanpur, dated the 28th of November, 1911.
(1) (1906) I.L.R., 33 Cal., 1047.
(2) (1887) I.L.R., 14 Cal., 501.

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of grace allowed by the Limitation Act of 1908. The reply to this was that one Ram Dayal, through whom they derived their title, had admitted the mortgage in question so late as the 2nd of June, 1909. Ram Dayal was examined by the court in a suit in which he was defendant and there he had said that "the whole of Janki Prasad's mortgage money is owing." That was a suit by a third party to recover possession of property covered by the present mortgage from Ram Dayal, who had purchased it at an auction sale. It appeared that there were other mortgages in favour of Janki Prasad as well as in favour of his brother, Mathura Prasad, executed by these two brothers in conjunction with some other persons.

The Subordinate Judge held that the statement of Ram Dayal in the deposition of 1902, amounted to an admission and decreed the suit.

Mr. B. E. O'Connor (The Hon'ble Dr. Tej Bahadur Sapru with him), for the appellants.

There were four mortgages over this property in favour of Janki Prasad or his brother in which the defendants were interested. It was not clear which of these Ram Dayal was referring to when he made that statement. He was mixed up in the description he gave because it did not tally with particulars of any one of the mortgages. There was not present before his mind any particular document under which he thought himself liable. There was no specification of any kind. An acknowledged mortgage must be a clear acknowledgment of a specific liability. Besides, it was not a voluntary acknowledgment. Ram Dayal was examined by the court, he was neither examined in chief nor cross-examined. There was no question at the time regarding any of these mortgages.

The Hon'ble Dr. Sundar Lal (Dr. Satish Chandra Banerji and Pandit Ramu Kant Malaviya with him), for the respondent.

The question was whether the acknowledgment fulfilled the requirements of section 19 of the Limitation Act. What was necessary to be seen was that the acknowledgment sufficed to identify the claim on the document under consideration. Looking to the depositions as a whole, it was clear that Ram Dayal meant to say that the entire money due to Janki Prasad was unpaid.

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Mathura Das, who was joint with Janki Prasad: one set were Brahmans and the other set Thakurs. This was a mortgage with possession. On the 8th of November, 1888, exactly the same persons made another mortgage of the same property in favour of the same person. On the 24th of January, 1892, another mortgage was made, but this time it was made by the Brahmans alone and of their share. But on the very same day the Thakurs made the mortgage now sued upon, of their share in the property. These mortgages were in favour of Janki Prasad. In effect these two last mortgages were one transaction and they were very similar to the other transaction of 1888 in which the Brahmans and Thakurs joined together. Reading the statement which Ram Dayal made as a whole, it is perfectly clear that he was referring to the two mortgages of the 24th of January, 1892, though he was probably unaware that the money was advanced on two documents instead of one.

It is quite clear that he was referring to the entire debt due to Janki Prasad because he refers to some members of each of the two sets of mortgagors though he does not name them all correctly. It is next contended that the statement does not satisfy the provisions of section 19 of the Limitation Act, because the acknowledgment was not given to the creditor, and the case of *Mythipore Iyasawamy Thapooray Woodhull v. The King* (1) is cited. The explanation to section 19 of the Limitation Act expressly states that an acknowledgment may be addressed to a person other than the person entitled to the property or right and in the case of *Minimam Seth v. Seth Bupchand* (2) where the acknowledgment was made under analogous conditions, their Lordships of the Privy Council referring to the explanation to section 19, held that the acknowledgment was good and satisfied the conditions of the section. Under these circumstances, we think that the view taken by the court below was correct and we accordingly dismiss the appeal with costs.

Appeal dismissed.
(1) (1887) L. R. B., 14 Cal., 801.
(2) (1903) L. R. B., 33 Cal., 1047.

Before Mr. Justice Ryves and Mr. Justice Lytle.

SANWAL SINGH (DEFENDANT) v. GANESHI LAL (PLAINTIFF).*

Civil Procedure Code (1908), order XXXIV, rule 1; order I, rule 9—Parties to suit—Mortgage—Joint mortgage of separate properties—Suit barred as against one mortgagee—Retaining property liable for whole debt.

The separate properties of two mortgagors were jointly mortgaged to secure one debt. The mortgagee sued for sale just within limitation, making one of the heirs of one mortgagor a party defendant, and stating that nothing had been heard of the other for twenty-five years. In the written statement it was pleaded that this heir was alive, but by that time the suit was against him was time-barred.

Held that the unimpleaded heir of the mortgagor was not a necessary party to the suit, and that the suit might be proceeded with against the other representative of the mortgagor and his separate property for the whole amount due on the mortgage.

Jai Gobind v. Jas Ram (1) followed. Gendun Lal v. Babu Ram (2) distinguished. Inam Ali v. Baij Nath Ram Sahu (3), Hakim Lal v. Ram Lal (4), Krishna Aiyar v. Muthukumaraswami Pillai (5), Haro Kumar v. Easton Mortgage Co., (6) and Debendra Nath Sen v. Mirza Abdul Samad (7) referred to.

ONE Umrao Singh in 1880 executed a mortgage of certain property in favour of the plaintiff's father. In 1910 the plaintiff instituted a suit for sale on the basis of this mortgage against Sanwal Singh, son of Angad Singh, one of the two sons of Umrao Singh, and alleged that, although there was, or had been, another son Mangal Singh, he had not been heard of for twenty-five years. In the written statement it was pleaded that Mangal Singh was alive, and was a necessary party to the suit. The lower appellate court found that Mangal Singh was alive; that he and Sanwal Singh were separate, and that the suit would not fail because Mangal Singh had not been impleaded, and decreed the plaintiff's claim against the property standing in the name of Sanwal Singh. The defendant thereupon appealed to the High Court.

Pandit Bray Nath Vyas, for the appellant.

The Hon'ble Dr. Tej Bahadur Sapru, for the respondent.

RYVES and LYTLE, JJ :—This was a suit to recover Rs. 920, the principal and interest due on a mortgage executed by Umrao

* Second Appeal No 1040 of 1912 from a decree of H. G. Allen, District Judge of Mainpuri, dated the 4th of May, 1912, modifying a decree of Jawad Husain, Munsif of Shikohabad, dated the 28th of January, 1911.

- (1) Weekly Notes, 1898, p. 120.
- (4) (1907) 6 C. L. J., 46.
- (5) (1905) 1 L. R., 29 Mad., 217.
- (6) (1907) 7 C. L. J., 274.
- (3) (1906) 1 L. R., 33 Cal., 618.
- (7) (1906) 10 C. L. J., 150.

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Singh on the 12th of July, 1880, in favour of the plaintiff's father, by sale of the mortgaged property.

It was stated in the plaint that Umrao Singh, the mortgagor, died leaving two sons, Mangal Singh and Angad Singh. The plaint recites:—"Mangal Singh has not been heard of for a long time, that is, for about twenty-five years, and Angad Singh died childless. In the public *khevat* the names of Mangal Singh, who has not been heard of, and of Sanwal Singh, defendant, stand recorded in the column of the mortgagor against the property mortgaged. Besides Sanwal Singh, defendant, no other heir of Umrao Singh, principal mortgagor, and of Mangal Singh, who has not been heard of, is in existence." This suit was instituted on the 2nd of August, 1910. In the written statement it was stated that Mangal Singh was alive and was in the service of the Indore State, and that he was a necessary party to the suit and that the claim was bad for non-joinder of a necessary party. This written statement was filed on the 24th of November, 1910. The courts below have decreed the suit and have directed that the whole amount claimed should be recovered by the sale of the property entered in the name of Sanwal Singh, and have excluded the share standing in the name of Mangal Singh. The learned District Judge found, *inter alia*, (1) that Mangal Singh was alive, (2) that Mangal Singh and Sanwal Singh were separate, (3) that the suit should not be dismissed altogether, because he had not been made a party.

Before us, in second appeal, two only of the pleas taken in the memorandum of appeal, have been pressed; first that on the finding that Mangal Singh was alive the whole suit should have been dismissed, as he had not been made a party, and secondly, that in any event, the half of the property recorded in Sanwal Singh's name ought not to have been made liable for more than half of the money claimed.

On the first point, reliance is placed on order XXXIV, rule 1, of the Code of Civil Procedure and *Gendun Lal v. Babu Ramm* (1). This case, however, does not apply, although some observations of the learned Judges and particularly those of Mr. Justice KARAMAT HUSAIN are against the appellant. We do not think

The question may be looked at from another point of view also. Order I, rule 9, provides that no suit shall be dismissed by reason of misjoinder or non-joinder of persons. That rule does not apply when a cause of action arises against a number of persons jointly, because in that case when one of such persons is eliminated, no cause of action subsists against the rest of them. If it does not subsist against all, it cannot subsist against any. In this case, however, the property has been divided, and portions of it are held separately by Mangal Singh and Sanwal Singh. No cause of action arises against them jointly, and the failure to implead Mangal Singh is no reason for dismissing the suit against Sanwal Singh.

Twelve years, and not sixty years, as had been held in these provinces, was the period within which, ordinarily, such a suit should be instituted. The plaintiff's suit on this mortgage would have been time-barred, had not the Legislature added section 31 to the Limitation Act. Under the provisions of that section the suit was in time up to the 8th of August, 1910. The plaintiff stated that he had no knowledge whatever of the existence of Mangal Singh and that was the reason why he was not made a party. By the time the written statement was filed, the claim against Mangal Singh was time-barred and the mortgage as against him and his property was extinguished. We do not think it was the duty of the plaintiff to bring on the record a person against whom no claim could be enforced in the suit. At the time of the trial of the suit there was no mortgage subsisting on the property of Mangal Singh. The only property which could be made liable for the mortgage money was the share in possession of Sanwal Singh. In this share Mangal Singh had no concern. He would not, therefore, seem to be a person having any interest in the subsisting mortgage security.

order XXXIV, rule 1, really has any application in the present case. That rule requires all persons having an interest in the mortgaged security to be joined in the suit. Now this mortgage was time-barred long ago on the proper construction of the law of limitation as laid down by their Lordships of the Privy Council.

On the second point, reliance is placed on *Imam Ali v. Baij Nath Ram Sahu* (1). In that case the ruling of this Court in *Jai Gobind v. Jas Ram* (2) was dissented from. But this opinion, as stated on page 121 of the report in I. L. R., 33 Cal., has not been consistently adopted even in the Calcutta Court. In *Halim Lal v. Ram Lal* (3), the ruling in *Krishna Aiyar v. Muthukumaraswamiya Pillai* (4), which supports us, was dissented from. In *Haro Kumari v. Eastern Mortgage Company* (5), however, the learned Judges considered the rulings in I. L. R., 33 Cal., p. 613 and in I. L. R., 29 Mad., p. 217 and stated:—"We consider the rule laid down in the last mentioned case is correct." In *Debeni Nath Sen v. Abdul Samad* (6) MOOKERJI, J., who also delivered the judgement in I. L. R., 33 Cal., p. 613, referred, apparently with approval, to the ruling in I. L. R., 29 Mad., 217 and to the ruling in C. L. J., Vol. VII, p. 274, and stated, as reported at page 175:—"The general rule unquestionably is that a mortgagee cannot be required, at the instance of a purchaser of a part of the premises, to apportion his mortgage-debt among the several parts into which the property has been divided and to look to each only for the proportionate share, unless circumstances have happened, the effect of which, in fact and in law, is to create a severance of the security." It seems, therefore, that the rule in I. L. R., 33 Cal., p. 613, was intended to govern the particular facts of that case on the point, and not to lay down any general rule. But, be that as it may, it seems to us that we should follow the ruling of this Court in A. W. N., 1898, p. 120, with which we entirely agree. It was laid down in that case that "if two properties are jointly mortgaged for the same debt, each of these properties is liable for the whole debt, and it is open to the mortgagee to proceed either against the whole of the mortgaged property or against a part only of such property." In this case, if the original mortgagee had been alive it would have been open to the plaintiff to bring to sale the whole or any part of the mortgaged property in the mortgagee's possession, and we do not see any reason why the right of the mortgagee should, in any way, be cut down

- (1) (1906) I. L. R., 33 Cal., 613. (4) (1905) I. L. R., 29 Mad., 217.
 (2) Weekly Notes, 1898, p. 120. (5) (1907) 7 C. L. J., 274.

- (3) (1907) 6 C. L. J., 46.
 (6) (1906) 10 C. L. J., 150.

or prejudiced owing to the fact that after the mortgagor's death the mortgaged property was divided without the mortgagor's permission, into two separate shares and separately possessed by two persons. We, therefore, think that the decree of the lower court was right and we dismiss this appeal with costs.

Appeal dismissed.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Banerji.
SRI KISHAN LAL (PETITIONER) v. KASHMIRO AND OTHERS (OPPOSITE PARTIES).*

Civil Procedure Code (1908), section 110—Appeal to His Majesty in Council—Regretments to be fulfilled before grant of certificate—Decree involving some question respecting property of the value of ten thousand rupees or upwards.

The value of the subject matter of the suit in the court of first instance was over Rs. 10,000, but the value of the subject matter in dispute on appeal to His Majesty in Council was less than Rs. 10,000. On the other hand, the proposed appeal to His Majesty in Council necessarily involved a decision as to the validity of an award which dealt with property of far greater value and which had been declared by the High Court to be invalid.

Held that the provisions of section 110 of the Code of Civil Procedure applied and a certificate should be granted. It was not necessary that at the time of presenting the application for leave to appeal there should be pending in a court a dispute respecting other property of the value of Rs. 10,000. *Maqarlane v. Leclaire* (1), *Musammal Altman v. Musammal Hasida* (2) and *Amunda Ghindra Bose v. Broughton* (3) referred to.

This was an application for leave to appeal to His Majesty in Council against a judgement of RICHARDS, C. J., and BANERJI, J., reversing a decree of the Subordinate Judge of Meerut. The facts, so far as they are material to the purposes of this report, are as follows:—

There was a dispute between the heirs of one Harnam Prasad as to the division of the family property. The family was possessed of property worth over Rs. 1,60,000, among which were certain mortgage rights. The matter was referred to arbitration by the male heirs, and an award was made in 1893, by which all the property, including the mortgage rights, was divided among the defendant, Musammal Kashmiri, the widow of the deceased, and certain persons who claimed to be members of the joint family with the deceased, the plaintiff being amongst them. The

* Privy Council Appeal No. 6 of 1913.

(1) (1882) 15 Moo. P. C. 181. (2) (1897) 1 Q. W. N., (Notes) 38. (3) (1872) 9 B. L. R., 423.

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lady was given an eight-anna share in the mortgagee rights, while the plaintiff was given four annas. The lady alone brought a suit upon the mortgage and recovered the money from the mortgagors. The plaintiff, thereupon, brought the present suit for recovery of his share (4 annas) in the mortgage money. The suit was valued at more than Rs. 10,000. The lower court gave the plaintiff a decree for Rs. 8,800. In appeal the High Court, holding that the award was fraudulent and collusive and that the family was a separate family, dismissed the suit.

The plaintiff applied for leave to appeal to His Majesty in Council. An affidavit was filed in the High Court along with this application that the decree would affect property valued at Rs. 40,000 in possession of the plaintiff under the award.

The Hon'ble Dr. SUNDAR LAL, for the appellant:—

In this case although the valuation of this particular appeal is below Rs. 10,000, yet the amount indirectly involved is over Rs. 10,000, inasmuch as the whole award has been declared to be invalid and that involves property worth over Rs. 10,000. The question of the validity or invalidity of the award cannot be raised in another suit. It is, therefore, a fit case in which leave to appeal should be granted. He cited *Andrew Macfarlane v. Francis Leclaire* (1), *Musammatt Aliman v. Musammatt Hasiba* (2) and *Ananda Chandra Bose v. Broughton* (3).

Mr. Nihal CHAND, for the respondent:—

The subject-matter in dispute means the property in dispute in the suit or appeal. Section 110 of the Code of Civil Procedure, 1908, refers to suits in existence and not to suits that may be brought in the future. Here the property in dispute was worth less than Rs. 10,000 and leave to appeal should not be granted; *Banars Prasad v. Kashi Krishna Narain* (4) and *Hannuman Prasad v. Bhagwati Prasad* (5).

RICHARDS, C. J. and BANERJI, J.—This is an application for leave to appeal to His Majesty in Council. The value of the subject-matter of the suit in the court below exceeded Rs. 10,000, but that of the proposed appeal to His Majesty in Council is Rs. 8,767-2-0, that is, below Rs. 10,000. The decree of this Court

- (1) (1862) 15 Moo. P. C. 181
(2) (1897) 1 C. W. N., (Notes) 93.
(3) (1872) 9 B. L. R., 428.
(4) (1900) 1 L. R., 23 ALJ, 227, (231).
(5) (1902) 1 L. R., 24 ALJ, 236.

reversed the decree of the court below. It is contended that, under section 110 of the Code of Civil Procedure, the appellant has a right to appeal to His Majesty in Council, because the decree of this Court involves, directly or indirectly, a claim or question respecting property of value exceeding Rs. 10,000. The question in this case was whether an arbitration award was binding upon Musammatt Kashmiri, one of the respondents to the proposed appeal. It is admitted that the award relates to property far exceeding Rs. 10,000 in value. This Court held, reversing the decision of the court below, that the award was not binding on the lady for reasons stated in this Court's judgement. It is the correctness of this decision which is challenged in the proposed appeal. If the decree of this Court becomes final, the question of the validity of the award will also become final as regards property other than the property in dispute in the present suit. It is, therefore, clear that the decree of this Court does involve a question relating to property of a value exceeding Rs. 10,000. It is contended on behalf of the opposite party that unless

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of the Code of 1882, which corresponds to section 110 of the present Code, was enacted. A similar view to that held by us appears to have been taken by the Calcutta High Court in *Musammat Allimun v. Musammat Hasiba* (1) and *Anda Chundia Bose v. Broughton* (2). As in the present case the decree involves a question respecting property of value exceeding Rs. 10,000, and as the decision of the court below was reversed by this Court, the case, in our opinion, fulfils the requirements of section 110 of the Code of Civil Procedure, and we so certify. Leave granted.

Before Mr. Justice Tubball and Mr. Justice Muhammad Rafiq.
MISS EVA MOUNTSTEPHENS (PETITIONER) v. MR. HUNTER GARNETT
ORRIS (OPPOSITE PARTY).*

Act No. X of 1895 (*Indian Succession Act*), section 244—*Civil Procedure Code* (1908), section 2—*Will*—*Probate*—*Application for probate dismissed*—*"Decree"*—*"Order"*—*Appeal*.

Mild that the order of a District Judge granting, or refusing probate of a will on an application made under the provisions of section 244 of the Indian Succession Act, 1895, is a decree within the meaning of section 2 of the Code of Civil Procedure, 1908, and appealable as such.

Mild also that the court fee payable on such an appeal is Rs. 10 under article 17, clause vi, of the second schedule to the Court Fees Act, 1870.

Unwao Chand v. Bindrabai Chand (3), *Hasof Hasshim Doogly v. Fatima Bibi* (4) and *Shahid Azim v. Chandra Nath Nandas* (5) referred to.

This was an application in the court of the District Judge of Saharapur for probate of the will of Miss Garnett Orme, who died at the Savoy Hotel, Mussorie, on the 18th of September, 1911. The applicant was the executrix named in the will. The granting of probate was resisted by the brother of the testatrix upon various grounds, and on the 12th of October, 1912, the District Judge dismissed the application. The applicant appealed from the High Court, framing her appeal as a first appeal from order and paying a court fee of Rs. 2. Before the appeal came on for hearing, the opposite party raised a preliminary objection that the District Judge's decision amounted to a decree within the meaning of section 2 of the Code of Civil Procedure and should

*First Appeal No. 285 of 1913, from a decree of W. D. Burkill, District Judge of Saharapur, dated the 12th of October, 1912.

- (1) (1897) 1 C. W. N., (Notes) 93. (3) (1896) 1 L. R., 17 All., 475.
(2) (1872) 9 B. L. R., 428. (4) (1896) 1 L. R., 24 Calo., 80.
(5) (1904) 8 C. W. N., 748.

there was nothing in law which gave the petitioner a right of appeal against the order of the first court. The petitioner has come up in second appeal, and a plea is urged that the decision of the first court is a decree within the definition thereof in section 2 of the Code of Civil Procedure and therefore an appeal would lie therefrom. The decision of the question really depends upon the answer to another question—Was or was not the proceeding in the court of first instance a suit within the meaning of the word in section 2 of the Code of Civil Procedure?

Under the Municipalities Act, section 187 (1), sub-section (h), the Local Government has power to frame rules consistent with the Act and applicable to all or any municipalities generally for regulating all elections under the Act. Under the former Municipalities Act, under the rules framed by the Government thereunder regulating elections, an election petition had to be filed in the court of the District Magistrate, and his decision thereon was final. When the draft rules under the present Act were published, they contained the same provisions, but when they were considered, the power of the District Magistrate to hear election petitions was removed and the rule was cast in the present rules as follows:—"The validity of an election, made in accordance with these rules, shall not be questioned except by a petition presented to a competent court within 15 days after the day on which the election was held by a person or persons enrolled in the municipal electoral roll." It is quite clear, therefore, that the petitioner in the present case presented his petition to the competent court under the above mentioned rule. It has been held in this Court that the competent court means a court of civil jurisdiction, as the question which arises is neither a criminal nor a revenue matter (1). Civil Courts have to do with a number of miscellaneous matters under special Acts which empower Civil Courts in certain circumstances to pass certain orders. Orders passed under those Acts are only appealable in so far as provision is made for appeals in the Acts themselves. They are orders which are not dealt with by the Code of Civil Procedure, and they are not decrees, as they are not passed in the course of suits. In the present instance, the petitioner has presented his petition to the District Magistrate, who has refused to entertain it. The question is whether the District Magistrate is a competent court under the above mentioned rule.

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The bond provided that in case of default of payment of any instalment, the creditors would be entitled to realize either the whole money with interest at 6 per cent. per annum or those instalments which remained unpaid. The defendant paid the first two instalments on the due dates. The third instalment, which fell due on 7th of January, 1906, was not paid. On the 17th of August, 1912, the plaintiffs brought their suit for the recovery of Rs. 530, principal and Rs. 223-2-0, interest, alleging that the cause of action for the suit accrued on the 7th of January, 1906, the date on which the breach of promise was made and also on the 7th of January, 1909, the date of payment of the last instalment. The defendant admitted the execution of the deed and the receipt of consideration, but pleaded limitation as a bar to the suit. The Munsif dismissed the suit, holding that it was brought beyond the period of limitation allowed by law. On appeal, the Subordinate Judge was of opinion that the suit was not time-barred and remanded the case to the first court for decision of the case on its merits. The defendant appealed.

Pandit Shiam Krishna Dar, for the appellant:—

The only question in this case was whether the suit, as brought, was barred by limitation. The bond being an instalment bond with a provision for the bringing of a suit for the whole amount on default of payment of any instalment, article 75, read with article 116, would apply. The first default was made on the 7th of January, 1906, and time began to run from that date for a suit on that bond. It was not open to the creditors to control the accrual of the cause of action which was laid down by the Limitation Act, and the fact that they had an option to sue made no difference so far as the running of time was concerned. The only way in which they could avoid limitation running from the date of default of the first instalment was by proving waiver of the right to sue for the whole amount of the bond. In the present case, the plaintiffs' claim was to enforce the condition which entitled them to recover the whole amount and not to plead waiver. The present suit having been brought on the 17th of August, 1912, that is, more than six years after the accrual of the cause of action, was therefore barred by

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time; *Sheo Narain v. Ram Din* (1), *Jadab Chandra Bakshi v. Bhairab Chandra Chuckerbutty* (2), *Rai Shitab Chand Nahar v. Hyder Mollah* (3). The case of *Ajudhia v. Kunjal* (4) was a case in which the claim was brought to recover the last three instalments that were due on a bond and not the whole amount. In that case it appears to have been assumed that the plaintiffs had waived their right to sue for the whole amount. But in the present case, the plaintiffs took their stand upon the special provision in the bond and sought to enforce that right. In fact, the plaintiffs themselves stated in their plaint that the cause of action to sue arose on the 7th of January, 1906, the date on which the first default was made.

Dr. *Satish Chandra Banerji* (for The Hon'ble Dr. *Tej Bahadur Sapru*), for the respondent:—

The bond gave the creditors an option to sue, but they were not bound to sue. It was open to them to exercise that option or not. Many instalments, due under the bond, were within time. Only a few earlier ones might be said to have been barred. There was no reason why the whole suit should have been dismissed and the plaintiffs not allowed to recover those instalments which were admittedly within time. There was no question of waiver in a case like this. He cited *Ajudhia v. Kunjal* (4), *Maharaja of Benares v. Nand Ram* (5) and *Shankar Prasad v. Jalpa Prasad* (6).

Pandit *Shiam Krishna Dar* was not heard in reply.

TUDBALL and MAHAMMAD RAFIQ JJ.:—This is a defendant's appeal and arises out of a suit on an instalment bond, dated, the 7th of July, 1904, for a sum of Rs. 680 as consideration, Rs. 600 being the actual amount of the loan and Rs. 80 being the interest thereon. The whole was repayable in $4\frac{1}{2}$ years in equal instalments of Rs. 75, payable every six months. There was a condition in the bond that if any instalment remained unpaid on the due date, then the creditor would be entitled to recover the whole sum at once with interest or that he might sue for each instalment as it fell due and remained unpaid. The first two instalments were paid on the due dates. The third instalment was due on the 7th of January, 1906. Neither this nor any of the subsequent

(1) (1910) 14 Oudh Cases, 129. (4) (1908) I. L. R., 30 All., 123.

(2) (1904) I. L. R., 31 Calc., 297. (5) (1907) I. L. R., 29 All., 431.

(3) (1896) 1 O. W. N., 229. (6) (1894) I. L. R., 16 All., 371.

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THE facts of the case are briefly, as follows :—

On the death of the *mutawalli* of a certain waqf the defendant No. 1 took possession of the waqf property as *mutawalli* and got his name entered in the revenue papers. The plaintiff, claiming that he was, under the will of the creator of the waqf, the rightful *mutawalli*, brought a suit in the Subordinate Judge's court for a declaration to that effect and for possession of the property. The Subordinate Judge was of opinion that the suit fell within the scope of section 92, Civil Procedure Code, and dismissed it as being beyond his jurisdiction. The plaintiff appealed.

The Hon'ble Dr. Sundar Lal (for Babu Jogindro Nath Chaudhri, with him Mr. S. A. Haider) for the appellant :—

The suit does not fall within section 92, Civil Procedure Code. The plaintiff does not seek to be appointed a *mutawalli*. He says that he is the *mutawalli* and that the defendant has no title. The suit is for declaration and possession ; it does not claim any of the reliefs contemplated by section 92. The suit is not one for the removal of a trustee ; for, according to the plaintiff, the defendant is not a trustee at all, but a person without right, a mere trespasser. Section 92 contemplates a suit by two or more members of the public who are interested in the welfare of the trust, but have no other individual rights whatsoever in it. Such a suit would not be affected in any way if any other members of the public, having an interest in the trust, were to be substituted for the original plaintiffs. The present suit does not deal with a public right; it has to determine only a private right. The question is between two individuals, as to which of them is entitled, under the constitution of the trust, to the office of *mutawalli*. The matter in issue is a private right, peculiar to the individual claiming it.

I rely on the following cases :—*Budree Das Mukim v. Chooni Lal Johurry* (1) *Manijan Bibee v. Khadem Hossein*, (2) *Ghelabhai Gavrishankar v. Uderam Icharam* (3) and *Sir Dinsha Manejji Petit v. Sir Jamsetji Jijibhai* (4). The case relied on by the lower court, namely, *Muhammad Ibrahim Khan v. Ahmad Said Khan*, (5) has no bearing on the present case. The only

(1) (1906) I. L. R., 33 Cal., 789. (3) (1911) I. L. R., 36 Bom., 29.

(2) (1904) I. L. R., 32 Cal., 273. (4) (1903) I. L. R., 33 Bom., 509.

(5) (1910) I. L. R., 32 All., 503.

point decided by it is that the selection of a trustee of a public trust is not a matter which can be referred to arbitration.

The Hon'ble Mr. *Abdul Raoof* (for *Maulvi Ghulam Muftaba*; with him the Hon'ble Dr. *Tej Bahadur Sapru*), for the respondents :—

The suit, although not brought in that form, is virtually one for the appointment of a new trustee, and falls within clause (b) of sub-section (1) of section 92. The question raised in the suit is whether the plaintiff or the defendant No. 1 should be appointed *mutawalli* to succeed to the last incumbent; and until the question is decided in favour of the plaintiff by a competent court he has no right to describe himself as being the *mutawalli*. His description of himself as being such, and of the defendant No. 1 as being a trespasser, cannot alter the real nature of the suit and take it out of the scope of section 92. The present case is covered by the ruling in *Muhammad Ibrahim Khan v. Ahmad Sayid Khan* (1). It is not necessary for me to go to the length of contending that no one can be a *mutawalli* unless and until he has been appointed by the District Court; my submission is that when there is a dispute between rival claimants to the office of *mutawalli* then it is only the court of principal civil jurisdiction that can decide the dispute, and make the appointment. That is the basis of the ruling in the case cited. For, if an ordinary civil court could take cognizance of such a dispute, then it could also delegate its powers to arbitrators and the matter could be decided by arbitration; which is a conclusion directly opposed to that ruling, which decides that it is because only a court of special jurisdiction can take cognizance of such disputes that those disputes cannot be referred to arbitration; *Sayid Ali v. Ali Jan* (2).

The Hon'ble Dr. *Sundar Lal* was not heard in reply.

BANERJI and RYVES JJ. :—This was a suit brought by the plaintiff in the court of the Subordinate Judge of Moradabad for a declaration that he was entitled to the office of *mutawalli* of the trust property in suit, under the will of the founder of the waqf as against defendant No. 1, and for possession of the waqf property by the ejection of defendant No. 1. The last *mutawalli*, Nawab Abdul Karim Khan, died on the 31st of August, 1908. On

(1) (1910) I. L. R., 32 All., 503.

(2) (1912) I. L. R., 35 All., 98.

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actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it." This case is therefore, not an authority on the question which is now before us. The case of *Sa'iyid Ali v. Ali Jan* (1) is also clearly distinguishable. In that case, the *mutawalli* had been appointed by the District Judge, and it was therefore held that, as it was a suit for the removal of a duly appointed *mutawalli*, it could only be brought in conformity with the provisions of section 92. In this case, the plaintiff says that he is the rightful *mutawalli* and that defendant No. 1 is wrongfully in possession of the waqf property. He does not ask for any of the reliefs specified in section 92. He is not suing on behalf of the public or of any section of the public, but merely as an individual to enforce his own alleged individual rights.

In our opinion, such a suit does not come within section 92 of the Civil Procedure Code and is, therefore, within the jurisdiction of the Subordinate Judge. We, therefore, allow the appeal, and, setting aside the decree of the lower court, remand the case to that court, under order XLI, rule 23, with directions to re-admit the suit under its original number and proceed to determine it on the merits. Costs here, and in the court below, will abide the result.

Appeal allowed and cause remanded.

Before Mr. Justice Banerji and Mr. Justice Muhammad Rafiq.

SHIVA PRAKASH (DEFENDANT) v. KARNA (PLAINTIFF) AND DHARAMJIT (DEFENDANT)*.

Civil and Revenue Courts—Jurisdiction—Occupancy holding—Usufructuary mortgage—Surrender of holding—Ejectment of mortgagee—Suit by mortgagee for declaration that surrender was not binding on him.

An occupancy tenant who had made a usufructuary mortgage of his holding then proceeded to surrender the holding to the zamindar, who had the mortgagee ejected by the Revenue court.

Held, on suit by the mortgagee for a declaration that the surrender of his holding by the mortgagor was not binding on him, that no such suit would lie in the face of the ejectment proceedings in the Revenue court which were binding on the parties. *Ram Devi Kuari v. Bindesri Upadhyaya* (2) followed.

* Second Appeal No. 4 of 1912 from a decree of Mubarak Husain, Judge of the Court of Small Causes, exercising the powers of a Subordinate Judge, of Agra, dated the 23rd of September, 1911, confirming a decree of Muhammad Amanul Haq, Additional Munsif of Agra, dated the 24th of July, 1911.

(1) (1912) I. L. R., 35 All., 98.

(2) (1911) 8 A. L. J., 1940.

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IN this case one Dharam Jit, an occupancy tenant, made a usufructuary mortgage of his holding in favour of Karna. Some years afterwards Dharam Jit surrendered the holding which he had mortgaged to Karna to his zamindar Shiva Prakash. Shiva Prakash took proceedings against Karna in the revenue court and had him ejected. Thereupon Karna brought the present suit in a civil court, asking for a declaration that the surrender of his holding by Dharam Jit to the zamindar was not binding upon him, the plaintiff. The court of first instance gave the plaintiff a decree, and this decree was affirmed by the lower appellate court. The zamindar thereupon appealed to the High Court.

Dr. *Satish Chandra Banerji*, for the appellant.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the respondent.

BANERJI and MUHAMMAD RAFIQ., JJ.:—Dharam Jit, an occupancy tenant, made a usufructuary mortgage of his holding to the plaintiff, Karna, on the 16th of April, 1901. Dharam Jit subsequently surrendered his holding to the zamindar, Jotshi Shiva Prakash, in June or July, 1910. Shiva Prakash brought a suit in the Revenue court for the ejectment of Karna and obtained a decree for ejectment on the 29th of November, 1910. Meanwhile on the 12th of September, 1910, Karna brought the suit out of which this appeal has arisen for a declaration that the surrender of his holding by Dharam Jit was not binding on him, the plaintiff.

The court of first instance granted the plaintiff a decree, and this decree has been affirmed by the lower appellate court. In our judgement, the decisions of both the courts below are incorrect. The Revenue Court having made a decree for ejectment, and this decree having been carried into effect and the plaintiff having been ejected, the present suit is, in our opinion, not maintainable. The decree of the Revenue Court is binding on the parties and any decree made in this suit would be wholly nugatory. The point is covered by authority, the latest reported case on the subject being *Ram Devi Kuari v. Bindesri Upadhya* (1). The judgement of the learned Judge who decided that case was affirmed on appeal under the Letters Patent (2). In this judgement all the authorities on the point are collected, and we are of opinion that in view of the decision in that case and of some of the cases on

(1) (1911) 8 A. L. J., 940.

(2) L. P. A. 127 of 1912, decided on the 26th of July, 1912.

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XXII, rule 10, of the Code of Civil Procedure. So far as the Hindu Widows' Remarriage Act went, it referred to widows who took the estate as Hindu widows. It could not be construed to mean widows who were Hindus at the time of remarriage. Every Act had to be interpreted to give it a reasonable meaning. Otherwise it would be open to this anomaly that a widow would forfeit her estate if she married a Hindu, but if she married a non-Hindu she would keep it. The Act did contemplate the conversion of widows and it purposely used the expression 'any widow' instead of 'Hindu widow' in section 2. The adjective 'Hindu' was used in sections 3 and 6 and not in section 2. This distinction was significant. It was not the conversion that lost her the estate but the remarriage.

RICHARDS, C. J. and BANERJI, J.—This appeal arises under the following circumstances. One Musammat Parbati, the widow of one Ganga Ram, who was a Hindu, instituted a suit claiming that she, in exercise of her legal rights, wished to make a well, and build a temple on a portion of the property in the possession of which she was as a Hindu widow. She alleged that the defendants to the suit were preventing her from exercising her legal rights and she claimed an injunction to restrain them. The plaintiff got a decree in the court of first instance. The defendants appealed. While the appeal was pending, Musammat Parbati became a convert to Muhammadanism and married one Wali Muhammad. She then put in a petition stating that she no longer wished to prosecute her suit and prayed that her suit might be dismissed. Thereupon the present respondent, Musammat Nirma, the mother of her husband, who would have been entitled to the estate for her life if Musammat Parbati were then dead, made an application that she might be brought upon the record and allowed to defend the appeal. The court below allowed this application. Hence the present appeal.

The appellants contend that Musammat Parbati did not lose her estate upon becoming a convert to the Muhammadan religion, but that her right to her husband's property was protected by Act XXI of 1850, and that being a Muhammadan she was entitled to contract a legal marriage with her present husband. On the other hand, the respondent contends that under section 2 of Act XV of

1856, the remarriage of Musammat Parbati worked a forfeiture of her interest in her first husband's estate, and that, therefore, there was a devolution of interest to the present respondent. It was further contended that even if this be not so, Musammat Parbati, though she represented her husband's estate so long as she remained a Hindu widow, ceased to do so when she changed her religion and married again, and that therefore the present respondent, as next reversioner, ought to be allowed to continue the proceedings and protect the estate.

In our opinion, her conversion to the Muhammadan religion did not divest Musammat Parbati of her interest in her first husband's estate in view of the provisions of Act XXI of 1850. This has been repeatedly held in this Court and by their Lordships of the Privy Council. The last case to which we may refer is the case of *Khunni Lal v. Govind Krishna Narain* (1). We are also clearly of opinion that section 2 of Act XV of 1856 does not divest her of her interest in her first husband's estate.

Section 2 of Act XV of 1856 cannot possibly include all widows. It is necessarily confined to "Hindu widows." Musammat Parbati was not a Hindu when she married her present husband. This Court has consistently held that the provisions of this Act do not apply to cases where the second marriage is valid irrespective of the provisions of the Act. Therefore, on the main ground of appeal, we think that the contention of the appellant is correct. Our attention has been called to the ruling of the Calcutta High Court, in the case of *Matungini Gupta v. Ram Rutton Roy* (2). This ruling is inconsistent with the rulings of our own Court.

With regard to the second contention, namely, that Musammat Parbati, in the events which have happened, ceased to represent her late husband's estate, we need only point out that the sole ground upon which the respondent could be substituted for Musammat Parbati would be that there had been a devolution of the estate, which, for the reasons already stated, is clearly not the case. No doubt, if anything detrimental to the estate is done by Musammat Parbati or by any other person, the reversioners may have a right to take steps for the protection of the estate by

(1) (1911) I.L.R., 38 All., 856. (2) (1892) I. L. R., 19 Cal., 289.

instituting a suit of their own. This is a very different thing to being substituted for Musammat Parbati in a suit which she instituted of her own motion and which she does not choose to prosecute.

We allow the appeal, set aside the order of the court below and dismiss the application with costs.

Appeal allowed.

Before Mr. Justice Sir Pramada Charan Banerji and Mr. Justice Tudball.
 RAM RAJ (OBJECTOR) v. BRIJ NATH, AND OTHERS (OPPOSITE PARTIES).
Act No. VII of 1889 (Succession Certificate Act)—Certificate of succession—Joint certificate not illegal if granted with the consent of the grantees.

Held that the grant of a joint certificate under the provisions of the Succession Certificate Act, 1889, is not illegal, provided that the persons to whom such certificate is granted all consent to its being granted in this form.

THE facts of the case were these:

Brij Nath, one of the heirs of a deceased Hindu, applied for a succession certificate. Two other heirs, Ram Raj and Ranchhor, preferred separate objections and claimed the certificate for themselves. Subsequently all three agreed to the grant of a certificate to them jointly. Another claimant to the certificate was Musammat Tirbeni, about whom the District Judge remarked as follows:—

“The position of Musammat Tirbeni in the family is only that of a person with a right to maintenance. She alleges that, as a special case, some of these debts belong to her. The ground on which the allegation is made is unusual. It seems not too probable that a woman would lend her *stridhan* to be invested and take no steps to see that it was invested in her own name. The burden of proving such a case is upon her, both as a matter of law and as a matter of common sense. Musammat Tirbeni adduced no evidence.” The District Judge granted the certificate to the three jointly, on condition of their furnishing security for the indemnity of Musammat Tirbeni. One of the objectors appealed.

Babu Binoy Kumar Mukerji, for the appellant:—

A joint certificate granted to several persons is not contemplated by the Succession Certificate Act and is illegal; *Lonachand Gangaram v. Uttamchand Gangaram* (1) and *Madan Mohan v. Ramdial* (2), and the cases cited therein. If the granting:

* First Appeal No 62 of 1913 from an order of A. Sabonadiere, District Judge of Aligarh, dated the 29th of November, 1912.

(1) (1891) I. L. R., 15 Bom., 684. (2) (1882) I. L. R., 5 All., 195.

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BRIJ NATH.

of a joint certificate is invalid, the consent of parties would not make it valid. Further, the District Judge was of opinion that *prima facie* there was no substance in Musammât Tirbeni's claim. She having failed to make out a *prima facie* claim, the Judge was not justified, without holding any further inquiry, in requiring security to be furnished by the grantees of the certificate. Before ordering security to be given, the Judge should have satisfied himself, by making a summary inquiry, that there was some foundation for her claim. I rely on the principle of the ruling in *Balmakund v. Kundan Kunwar* (1).

The respondents were not represented.

BANERJI and TUDBALL, JJ :—We do not think that there is any merit in this appeal. The facts are these : An application was made by Brij Nath for a succession certificate to realize debts due to Ram Ratan, deceased. Ram Raj, Brij Nath and Ranchhor stated themselves to be the next reversioners to the estate of Ram Ratan, and they agreed that the certificate should be granted to all three of them. This has been done. But as Musammât Tirbeni claimed to be the owner of some of the debts, the learned Judge has ordered the three persons to whom the certificate was granted to furnish security. It is contended that the order granting a certificate to three persons is illegal. No doubt, it is inconvenient that a certificate should be granted to more than one person, but in the case before us the persons to whom the certificate was granted agreed to its being granted to all of them. One of these persons is the appellant himself. We do not think that the appellant can now contend that the court ought not to have granted the certificate. The precedents cited relate to cases in which there were rival claimants for the certificate, and the lower court granted a joint certificate to those claimants. This, of course, was held to be wrong. As for the order relating to the furnishing of security, we think under the circumstances it was a proper order. We dismiss the appeal but without costs, as the respondent is not represented.

Appeal dismissed.

(1) (1905) I. L. R., 27 All. 452.

1913
July, 1.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Tudball.
JANKI MISIR AND ANOTHER (DEFENDANTS) v. RANNO SINGH (PLAINTIFF) AND
MAHADEO SINGH AND ANOTHER (DEFENDANTS).*

*Pre-emption—Custom—Evidence—Sales to strangers unchallenged, as evidence
negating custom—Mode in which such sales should be proved.*

Where the court is trying the issue of the existence or non-existence of a custom of pre-emption, every instance of a sale to a stranger is material evidence which the court ought to take into consideration and weigh when coming to a conclusion on the issue. But a mere vague statement that there had been sales to strangers without the production of the sale-deeds or certified copies thereof and without some further details of the sale is not sufficient to prove sales to strangers. *Sewak Singh v. Girja Pande* (1) discussed.

THIS was a suit for pre-emption based upon an alleged custom as to the existence of which the principal evidence was an entry in the willage *wajib-ul-arz*. The defendants disputed the construction of the entry in the *wajib-ul-arz* relied upon by the plaintiffs, and they also pleaded that there had been several cases in the village of sales to strangers in respect of which no claim for pre-emption had been made, and put forward these instances as evidence that the custom alleged did not exist. The court of first instance, however, decreed the claim and this decree was confirmed on appeal. The defendants vendees appealed to the High Court.

Mr. A. P. Dube and Dr. S. M. Suleman, for the appellants.

Dr. Satish Chandra Banerji, for the respondents.

RICHARDS, C. J. and TUDBALL, J.—This appeal arises out of a suit for pre-emption. Both the courts below decreed the claim. The defendant vendee appeals. He argues first that the extract from the *wajib-ul-arz* is ambiguous and not sufficient to prove the existence of the custom. He also argues that there was other evidence as to the non-existence of the custom which the court below has failed to appreciate; and lastly, it is argued that the court was not competent to set aside the lease mentioned in the plaint. We can see no ambiguity in the clause in the *wajib-ul-arz*: We, therefore, think that the courts below were right in holding that it was good *prima facie* evidence of the existence of a custom of pre-emption in this village, and that it was an incident of that custom that a relation *ek-jaddi* had preference over a co-sharer who was not

*second Appeal No. 445 of 1913 from a decree of L. Marshall, District Judge of Jaunpur, dated 15th of January, 1913, confirming a decree of Gopal Das Mukerji, Munsif of Jaunpur, dated 10th of June, 1912.

(1) (1904) 2 A. L. J., 6.

ek-jaddi. The court below has found that the lease was not *bond fide* and was merely part of a scheme to avoid pre-emption. We are bound by this finding in second appeal, and therefore we cannot differ from the court below on this question. One of the witnesses for the defendant vendee deposed that there had been several sales to strangers. The court of first instance refers to the decision in *Sewak Singh v. Girja Pande* (1). STANLEY C. J., at page 9 of the report, says :—"The mere fact that evidence was given that sales and mortgages had taken place in the villages as to which no pre-emptive claim had been made does not negative the existence of the custom." With great respect, we think that this remark goes too far. In our opinion, where the court is trying the issue of the existence or non-existence of a custom every instance of a sale to a stranger is material evidence which the court ought to take into consideration and weigh when coming to a conclusion on the issue. In the present case having regard to the remarks of the court of first instance, which have been more or less accepted by the lower appellate court, we have gone into and considered the evidence that was given by the vendee on the subject of sales to strangers. The only evidence there was that of a witness who was undoubtedly somewhat hostile to the plaintiff, in which he stated in vague terms that during his recollection these 5—7 sales were to strangers. In not a single one of these alleged cases was the sale-deed produced, nor were even the names of the majority of the vendees mentioned. Except for the vague statement that the sales were to strangers, the court was not informed who the vendees were. In our opinion, this was not the proper way to prove instances of sales to strangers. The sale-deeds should have been produced, or certified copies of them. It should be clearly and distinctly proved to the court who the vendees were and any other circumstances connected with the sales. Under these circumstances, we see no sufficient reason to set aside the decree of the court below. We, therefore, dismiss the appeal with costs.

Appeal dismissed.

(1) (1904) 2 A.L.J., 6.

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JANKI MISIR

v.

RANNO
SINGH.

1918
July, 1.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Tudball.
PARMANAND SINGH AND OTHERS, (DEFENDANTS) v. MAHANT RAMANAND GIRI
 (PLAINTIFF.)*

Act (Local) No. II of 1901 (Agra Tenancy Act), sections 11 et seqq—Occupancy holding—Mahant—Mahant capable of acquiring occupancy rights for the benefit of the math which he represents.

Held that the mahant of a math, just as much as any other tenant who holds for his own personal benefit, can acquire occupancy rights under the provisions of the Agra Tenancy Act, 1901, for the benefit of the math which he represents.

THIS was a suit for redemption of a mortgage made by a former mahant of a math. The plaintiff, as the present mahant, sued to redeem the property mortgaged, which belonged to the math and consisted of certain trees and rights of occupancy tenancy in certain plots of land. It was pleaded in defence that the plaintiff had no right to sue, as a math was not capable of acquiring or holding an occupancy tenancy. The court of first instance decreed the suit for the redemption of the mortgage of the occupancy tenancy and dismissed it as to the trees, and the lower appellate court confirmed the decree.

Mr. M. L. Agarwala (and Munshi Benode Behari), for the appellants:—

An idol could not acquire occupancy rights in a holding. The Act contemplated cultivation by the tenant himself. Under section 10 of the Agra Tenancy Act, in case of transfer of *sir* lands, they become subject of ex-proprietary tenancy. The idea was to provide means of subsistence for the tenant. A math could not acquire ex-proprietary rights. The Act did not contemplate the acquisition of such rights by the manager of a math. A "person" meant a living human being, and the section referred to a person who had "held" personally. This view was taken by the Board of Revenue in Select Decision No. 19 of 1912. Again the expression used in section 13 was "he". It could include "she" but not an inanimate object. A tenant must be a person capable of occupying or cultivating the land.

Munshi Gobind Prasad, for the respondent, was not called upon.

*Second Appeal No. 57 of 1918 from a decree of Sri Lal, District Judge of Ghazipur, dated the 12th of September, 1912, confirming a decree of Aijaz Husain, Munsif of Rasra, dated the 31st of May, 1912.

RICHARDS, C. J. and TUDBALL, J.—This appeal arises out of a suit for redemption of a mortgage. Two grounds of appeal are mentioned in the memorandum of appeal, namely, that the plaintiff was not entitled to redeem the property and secondly that the suit was barred by limitation. We are unable to accept the argument in favour of this last ground of appeal. With regard to the first point, it is urged that nobody except a human being is capable of acquiring or holding an "occupancy" tenancy, and reliance is placed upon a ruling of the Board of Revenue, No. 19 of 1912, *Babu Hira Das v. Pandit Sheo Dat Tiwari*. It has to be admitted that property of all descriptions generally speaking, can be held by a *math*; but it is attempted to draw a distinction between an occupancy holding and other classes of property. In the present case the courts below have found that the property which it is sought to redeem formed portion of the *math* property and that it was held by the mortgagor as *mahant*. It was pleaded in the suit that the mortgagor had been deposed from his office as *mahant*, and that he was succeeded by Sheo Pujan Gir, who was in turn succeeded by the present plaintiff. The mortgagor was made party to the suit, but he has not appeared to defend the case. It must be admitted that it is not necessary that the owner of an occupancy holding should do the actual cultivation with his own hands. He is quite entitled to, and in many cases must, employ others to do the cultivation. It is quite clear that there is no express prohibition against the acquisition of an occupancy holding by the manager of a *math* on behalf of the *math*. We do not think that it is possible to infer such a prohibition from any suggestion of alleged policy in the Tenancy Act.

We, therefore, think that the decision of the court below was correct and ought to be affirmed. We dismiss the appeal with costs.

Appeal dismissed.

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v.

MAHANT

RAMANAND

GIR,

FULL BENCH.

1913
July, 4.

Before Mr. Justice Sir George Knox, Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

BAJRANGI LAL AND OTHERS (JUDGEMENT-DEBTORS) v. MAHABIR KUNWAR
AND OTHERS, (DECREE-HOLDERS.)*

Act No. VII of 1870 (Court Fees Act), schedule I, article 1; schedule II, article 11—Civil Procedure Code (1908), order XXXIV, rule 5—Court fee—Appeal from final decree in a mortgage suit.

Held that an appeal from the final decree passed under order XXXIV, rule 5, of the Code of Civil Procedure, 1908, requires an *ad valorem* court fee and cannot be stamped as an appeal from an order.

THE question raised in this case was as to the proper court fee payable upon an appeal from a final decree under order XXXIV, rule 5, of the Code of Civil Procedure. When the appeal was filed the stamp-officer of the Court reported as follows:—

“This is an appeal against an order passed under order XXXIV, rule 5, and it is appealable as an appeal from decree. This appeal is valued at Rs. 582-11-9 on which a court fee of Rs. 44-4-0 is payable. Rupees 2 having been paid, there is, therefore, a deficiency of Rs. 42-4-0 on this memorandum of appeal.”

On admission of the appeal a further report was made:—

“For the reasons given in my report, dated the 14th of June, 1912, on the memorandum of appeal to this Court, the decree-holders respondents are liable to pay a court fee of Rs. 105 on Rs. 1,503-6-1, the valuation of their appeal to the lower appellate court. A court fee of annas 8 having been paid, there is, therefore, a deficiency of Rs. 104-8-0 due from them for the lower appellate court.”

The question thus raised was remitted by the Taxing Judge, to the Bench hearing the appeal, by whom the following order was made.

KNOX and MUHAMMAD RAFIQ, JJ:—Another question arises in connection with this second appeal. The appeal before us is an appeal against an order under order XXXIV, rule 5, of the Code of Civil Procedure. It was valued at Rs. 582-11-9 and was put in on a paper bearing a court fee stamp of Rs. 2. The office reported that the fee payable was Rs. 44-4-0 and that therefore

*Stamp Reference in Execution Second Appeal No. 900 of 1912.

the appellant had to pay a deficiency of Rs. 42-4-0. The appellant raised no objection and made good the deficiency. The stamp-officer of the Court then pointed out that, for similar reasons the decree-holders, the respondents in this appeal, were liable to pay a court fee of Rs. 105, instead of the court fee of eight annas which they paid on their appeal in the court of the District Judge. There was, therefore, a deficiency of Rs. 104-8-0 due from them. The respondents contested this report, and the Judge of this Court, to whom a reference was made, and who happens to be the Taxing Judge of the Court, held that the matter was one for the Bench hearing the appeal. The learned vakil for the respondents contended before us that the fee which he had paid in the court of the District Judge was all that was required by law and there was no deficiency due from him. The question raised is not free from difficulty, and it will affect a large number of cases if this Court should hold that an appeal from an order absolute should bear the same fee as if it were an appeal from an original decree. The learned vakil asks us for time in which to prepare the case. We grant two weeks; but we think it would be well if we had another Judge to assist us in determining this question. We think that the learned Government Advocate should also appear in the interest of the revenue. We direct that these papers be laid before the Hon'ble the Chief Justice with a request that a third Judge should be added to the Bench for the determination of this question.

The case was then laid before KNOX, TUDBALL and RAFIQ, JJ.
Babu *Sital Prasad Ghose*, for the respondent :—

The court is bound to make a final decree under order XXXIV, rule 5, if the provisions of the preliminary decree passed under order XXXIV, rule 4, are not complied with. So that the only matter which the court, upon an application under order XXXIV, rule 5, is called upon to decide, is whether there has or has not been such compliance. This is no more than what an executing Court has to do, and it is submitted that the final decree is an order within the meaning of section 47 of the Code. It is not suggested that an application for a decree under order XXXIV, rule 5, must bear an *ad valorem* court fee, and there is no reason why, when such application is refused and an appeal is taken

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KURWAR.

from that refusal, the memorandum of appeal should be stamped with an *ad valorem* court fee. Anyhow the Court Fees Act makes no distinction between preliminary and final decrees, and the word 'decree' used in that Act must bear the ordinary meaning given to that expression in the first part of the definition of the term in the Code of Civil Procedure. It is clear, therefore, that the court fee paid by the present respondent in the court of the District Judge was all that was required by law and there was no deficiency due from him.

The Government Advocate (Mr. W. Wallach), was not called upon to reply.

KNOX, TUDBALL and MUHAMMAD RAFIQ, JJ:—We have heard all that the learned vakil for the respondent can urge in support of his contention that he was only bound in the lower appellate court to pay a court fee of annas eight as though he were appealing from an order, instead of an *ad valorem* duty. Looking to the change which has been made by the Legislature in order XXXIV, rules 4 and 5, as compared with sections 88 and 89 of the Transfer of Property Act, we have no doubt whatever that the court fee which he should have paid was an *ad valorem* court fee. The Legislature has deliberately altered the words "order absolute" and replaced them by the words "final decree." This is our answer to the question.

APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Tudball.

YAD RAM (PLAINTIFF) v. OHEDA LAL AND OTHERS (DEFENDANTS).*

Pre-emption—Wajib-ul-arz—Partition of village into several mahals—Dastur dehi relating to whole village—Suit by co-sharer of one mahal against co-sharer of another mahal on ground of nearness in relationship to the vendor.

The *dastur dehi* of a village divided into several mahals, but which nevertheless was held to be applicable to the whole village, and to represent an arrangement come to by the co-sharers in the village amongst themselves, provided, as to pre-emption, as follows:—"If a co-sharer wants to sell his share, he must sell first to near co-sharers, then in the patti, then in the mahal, then in the village." Held that the effect of this clause was to give to a co-sharer in one mahal who was a relation of the vendor a preferential right of pre-emption over a co-sharer in another mahal who was not a relation.

* First Appeal No. 99 of 1912 from a decree of Muhammad Husain, First Additional Subordinate Judge of Meerut, dated the 30th of November, 1911.

1913
July, 8.

THIS was a suit for pre-emption based upon the provisions of the *wajib-ul-arz* or *dastur dehi* of the village of Sarai Ghasi. The village at one time was divided into a $2\frac{1}{2}$ -biswa mahal held by the Skinner family and a $17\frac{1}{2}$ -biswa mahal held by other co-sharers. Subsequently the larger mahal was again sub-divided. The *dastur dehi*, however, was apparently applicable to the entire village, and represented an arrangement come to amongst the entire body of co-sharers. The provisions of the *dastur dehi* as to pre-emption were as follows :—"If a co-sharer wants to sell his share, he must sell first to near co-sharers, then in the patti, then in the mahal, then in the village." The property the subject of the present suit was situate in the Skinner mahal. The vendee was a co-sharer in another mahal of the village; and the plaintiff pre-emptor was a co-sharer in a third mahal, but claimed precedence of the vendee owing to his being a relation of the vendor. The court of first instance dismissed the suit. The plaintiff appealed to the High Court.

The Hon'ble Dr. *Sundar Lal*, for the appellant.

Dr. *Satish Chandra Banerji* and Babu *Piari Lal Banerji*, for the respondents.

RICHARDS, C. J. and TUDBALL, J.—This appeal arises out of a suit for pre-emption. The village in which the property is situate is called mauza Sarai Ghasi. At one time this village was divided into a $2\frac{1}{2}$ -biswa share, held by the Skinner family, and a $17\frac{1}{2}$ biswa share held by other co-sharers. In course of time the $2\frac{1}{2}$ biswas appear to have been formed into one mahal, and the $17\frac{1}{2}$ biswas into another mahal. The $17\frac{1}{2}$ biswas were afterwards divided into a number of different mahals. The property which is sought to be pre-empted is situate within the Skinner mahal. It appears that on the 13th of February, 1892, this very property was sold and purchased by one Bhola Mal. The present vendor, Ram Sahai, brought a suit for pre-emption, which was successful. He was a sharer in another mahal and he based his suit upon a record set forth in the *dastur dehi* of 1886. His claim was decreed, the court being of opinion that the record in the *dastur dehi* was one of an arrangement between the sharers in the entire village. There is this distinction between the present case and the one just mentioned, that in that case the claim was against a

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v.
CHEDA LAL.

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V.
CHEDI LAL.

stranger whilst, in the present case, the claim is by a sharer in a different mahal, who is a near relation of the vendor against a person who is a sharer in another mahal, but no relation. The court below has decided against the plaintiff and dismissed the suit. It has referred to the case of *Ganga Singh v. Chedi Lal* (1). In that case this Court considered at some length what was the proper way to approach the consideration of a case of pre-emption where the issue was the existence or non-existence of a custom of pre-emption, and it pointed out that the weight which should be attached to extracts from the *wajib-ul-arzes* in different cases varied very much. The circumstances of the present case are very different. The extract from the *dastur dehi* of 1886, has been translated as follows:—

"If a co-sharer wants to sell his share, he shall first sell it to his near co-sharers, then to sharers in the *patti* mahal, or the village; and if they refuse to take, then to any one he may like."

A more literal translation would be:—

"A co-sharer must sell first to near co-sharers, then in the *patti*, then in the mahal, then in the village."

This *dastur dehi*, notwithstanding that the village had been divided into a large number of mahals, was the *dastur dehi* for the entire village. Having regard to the division which had taken place, *karibi* cannot refer to anything except relationship, that is to say, a sharer who is related. Furthermore, the fact that defendant's vendor himself set up the right of pre-emption contained in this very document, is, we think, a very strong point both against himself and his vendee. The title of the defendant's vendor was this very decree in a suit for pre-emption. We are not in any way deciding that a custom of pre-emption exists. There are many reasons for thinking that the growth of such a custom in this village, owned as it was in part by members of the Skinner family, was very improbable. But if the *dastur dehi* records an arrangement between the sharers in the village, it is an arrangement which is still in force. We think there was such an arrangement. There only remains the question whether or not, assuming that an arrangement between the owners of the village as to pre-emption

exists, it extends to giving a right of a sharer in one mahal, who is a relation, a preference over a sharer in another mahal who is no relation. We think that the clause, as a whole, can have no other meaning. We, therefore, think the decree of the court below was erroneous and ought to be set aside. Before, however, finally deciding this appeal, it will be necessary to refer an issue to the court below, namely :—

What was the true sale consideration ?

We accordingly refer the above issue to the court below. The court below will receive such evidence relevant to this issue as the parties may adduce. On return of the finding, the usual ten days will be allowed for filing objections.

Issue remitted.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Sir Pramada Charan Banerji.

1913
July, 11.

MAHADEO SINGH AND ANOTHER (DECREE-HOLDERS) v. SHEO KARAN SINGH AND ANOTHER (JUDGEMENT-DEBTORS).*

Hindu law—Daughter's estate—Decree for possession of father's estate obtained by daughter—Right of daughter's sons to execute such decree

The daughter of a separated Hindu obtained a decree for possession of her father's estate against certain trespassers. Before, however, she could obtain possession, she died and her sons applied for execution. *Held* that the daughter represented her father's estate when she brought her suit for possession and that persons who succeeded to the estate, were entitled to execute the decree which she had obtained.

THIS was an appeal under section 10 of the Letters Patent from a judgement of a single Judge of the Court. The facts of the case are stated in the judgement under appeal which was as follows :—

"The two respondents Mahadeo Singh and Basdeo Singh, with their mother Lakhpati Kuar, instituted a suit for recovery of possession of certain immovable property against one Jagram Singh, on the allegation that the property in suit belonged to one Sarup Singh, who was the father of Lakhpati Kuar and grandfather of the respondents. Jagram Singh was a collateral of Sarup Singh. He resisted the suit on various grounds. The claim of the respondents was dismissed on the ground that it was premature and that it could not be brought in the life-time of their mother ; but a decree was passed in favour of Lakhpati Kuar in her own right as the daughter of Sarup Singh. She was decreed a daughter's estate. The first court passed the decree in her favour on the 26th. of

* Appeal No. 45 of 1913 under section 10 of the Letters Patent.

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SINGH.

November, 1909, and it was upheld on appeal on the 13th of May, 1910. Both Musammat Lakhpati Kuar and Jagram died before the decree could be executed. The two respondents, the sons of Lakhpati Kuar, filed an application in the court of the Munsif of Azamgarh for execution of the decree in favour of their mother against the appellants, who are the legal representatives of Jagram Singh. The appellants opposed the application for execution, on the ground, among others, that the decree in favour of Lakhpati Kuar awarded her a life-estate only and could not be executed after her death. The learned Munsif gave effect to this plea and rejected the application. On appeal the learned District Judge reversed the decree of the first court on the ground that the respondents were the legal representatives of Musammat Lakhpati Kuar, the original decree-holder, and that for that reason the decree could be executed by them. The appellants have come up in second appeal to this Court and press the plea upon which the application was dismissed by the learned Munsif. I think that this appeal must prevail. The question at issue between the parties is not whether the respondents are or are not the legal representatives of Musammat Lakhpati Kuar, but whether the decree in favour of Lakhpati Kuar is capable of execution after her death. It is admitted that the decree was passed in her favour as the daughter of Sarup Singh, giving her a daughter's estate in respect of the property relating to which the decree was passed in her favour. After her death the decree became inoperative. It may be that the two respondents have a right to succeed to that property in preference to the collaterals of Sarup Singh. But that is a question which should be decided between the rival claimants by a regular suit. The mere fact of the two respondents being the daughter's sons of Sarup Singh does not give them the right to apply for execution of a decree, which became inoperative after the death of their mother. The appeal prevails. I set aside the order of the lower appellate court and restore that of the first court. Costs are allowed to the appellants."

The applicants appealed under section 10 of the Letters Patent.

Dr. Surendra Nath Sen, for the appellants :—

Musammat Lakhpati, as owner and representative of the estate, brought the suit for recovery of the estate from a person who was a mere trespasser. It was not a mere personal action like a suit for damages; she represented and was acting for the benefit of the whole estate. After her death the appellants became the owners of the estate. Under such circumstances the decree obtained by her cannot cease to be operative after her death. The appellants are entitled to execute it. In her suit it was established that the property was the exclusive property of her father and that she was the heir. It follows as a legal consequence that after her death her sons are the owners. They need not bring a fresh suit to establish the same matter against the same defendant or

his representatives; they are entitled to the benefit of the decree obtained by the former holder of the estate as such.

Maulvi *Muhammad Ishaq*, for the respondents :—

Musammat Lakhpati's success in her suit did not necessarily carry with it the effect that after her her sons would be the owners. The sons might predecease her or be under some disqualification. It was not a judgement *in rem*, but a personal decree. Under the Hindu Law the daughter's sons do not derive their title through the daughter, but through the maternal grandfather. The appellants, not being the heirs of Musammat Lakhpati but of Sarup Singh, are not benefited by the decree in her favour. On her death the question of the succession to Sarup Singh's estate opens up afresh. As sons of Musammat Lakhpati the appellants are not entitled to execute the decree.

Dr. *Surendra Nath Sen* was not heard in reply.

RICHARDS, C. J., and BANERJI, J.—In this case one Musammat Lakhpati brought a suit for possession against certain persons who, she alleged, had taken possession of her father's estate. She succeeded in establishing her case and getting a decree for possession. Before, however, the decree for possession could be executed she died, and thereupon her sons applied for execution, but their application was rejected by the court of first instance. On appeal, this decision was reversed and the application of the appellants was allowed. In second appeal, a learned Judge of this Court held that the decision of the court of first instance was correct and ought to be restored. Hence the present appeal.

In our opinion, the decree of the lower appellate court was correct. Musammat Lakhpati undoubtedly represented her father's estate when she brought the suit, and the persons who succeeded to the estate are entitled to execute the decree which she obtained. Otherwise the reversioners would be obliged to institute a fresh suit and to litigate again the same matters against the very same persons against whom Musammat Lakhpati had established her case. In principle the matter is governed by the decision of their Lordships of the Privy Council when they decided that, for general purposes, the widow represents the estate. We can, in the present case, make no distinction between a widow in possession

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of her deceased husband's estate and a daughter in possession of her deceased father's estate. We allow the appeal, set aside the decree of the learned Judge of this Court and restore the decree of the lower appellate court with costs in all courts.

Appeal allowed.

1915
June 17.

Before Mr. Justice Sir Paramada Charan Banerji and Mr. Justice Tudball.
ALAM SINGH (PLAINTIFF) v. GOKAL SINGH AND OTHERS (DEFENDANTS).
Civil Procedure Code (1909), order XXXIV, rule 1—Mortgage—Suit for sale—
Intentional non-joinder of subsequent mortgages—Effect of such non-joinder.

Subsequently to the execution of a mortgage of a 4 biswa zamindari share in favour of A. S. the mortgagor executed a further (usufructuary) mortgage of a portion of the same share in favour of A. S. and his brother N. S. A. S. brought a suit for sale on the earlier mortgage, but without making N. S. a party thereto. *Held*, that the effect of the nonjoinder of N. S. would not be the total dismissal of the suit, but only of so much of it as related to that portion of the property which was covered by the subsequent mortgage.

THE facts of this case were as follows:—

A simple mortgage, hypothecating a 4 biswa zamindari share, was executed on the 21st of April, 1892, in favour of Alam Singh. On the 28th of June, 1895, a usufructuary mortgage of 1½ biswas out of the 4 biswas was executed in favour of Alam Singh and his separated brother, Narain Singh. Alam Singh brought a suit on the prior mortgage. He did not mention the second mortgage and did not make Narain Singh a party to the suit. Objection on this score was taken at the earliest opportunity by the transferee of the equity of redemption. The existence of the second mortgage was proved, and the plaintiff was called upon to make Narain Singh a defendant. The plaintiff refused to do so on the ground that at that time the suit had become time-barred as against Narain Singh. The court of first instance dismissed the suit on the ground that Narain Singh was a necessary party and had not been impleaded. This decision was upheld by the lower appellate court. The plaintiff appealed to the High Court.

Mr. E. A. Howard, for the appellant:—

A subsequent mortgagee is, no doubt, a necessary party and order XXXIV, rule 1, requires him to be impleaded. But failure

*Second Appeal No. 1388 of 1912 from a decree of A. Sabonadiere, District Judge of Aligarh, dated the 7th of June, 1912, confirming a decree of Rama Das, Munsif of Etah, dated the 2nd of February, 1911.

to implead him does not necessarily entail the dismissal of the suit altogether. Order XXXIV, rule 1, is expressly made subject to the other provisions of the Code; it is therefore, governed by order I, rule 9. The court should have determined the rights of the parties actually before it. Narain Singh would neither be bound nor affected by the decree; he could enforce his right of redemption in a subsequent suit. The case of *Ram Charan Lal v. Muhammad Rashid-ud-din* (1) is in my favour. In any event, the whole suit should not have been dismissed, but only to the extent of the property comprised in the second mortgage.

Babu Binoy Kumar Mukerji (with him Munshi Gobind Prasad), for the respondents :—

Previous to the enactment of the present Code of Civil Procedure it was well established that the deliberate non-joinder of a subsequent mortgagee was fatal to the suit. The question is how far the provisions of order I, rule 9, are to govern order XXXIV, rule 1. On this point I rely on the observations at page 553 of the report of the case of *Hori Lal v. Munman Kunwar* (2). The plaintiff was well aware of the existence of the second mortgage, as he himself was one of the mortgagees thereunder. This is a case of deliberate non-joinder of a necessary party. Moreover, when called upon to make Narain Singh a party, the plaintiff refused to do so. The provisions of order XXXIV, rule 1, would become quite nugatory if cases like the present could go on with impunity, and the result would be a perplexing multiplicity of suits. At all events, the suit should be dismissed at least to the extent of the property comprised in the second mortgage. This suit is now time-barred as against Narain Singh; as against the property comprised in his mortgage, the suit must be dismissed.

Mr. E. A. Howard replied.

BANERJI and TUDBALL JJ.:—This was a suit for sale under a mortgage, dated the 21st of April, 1892, executed in favour of the plaintiff, Alam Singh, by one Chatar Singh. The first set of defendants are the legal representatives of the mortgagor, who is now dead. The other defendants are subsequent transferees of the mortgaged property. It appears that on the 28th of June, 1895, a usufructuary mortgage of 1 biswa, 10 biswansis, out of the mortgaged

(1) (1912) 10 A.L.J., 134.

(2) (1912) I.L.R., 34 All 549.

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property, the extent of which is 4 biswas, was made in favour of the plaintiff, Alam Singh, and Narain Singh, his brother. Narain Singh was not made a party to the suit. On the ground that Narain Singh was a necessary party to the suit under order XXXIV, rule 1, of the Code of Civil Procedure and had not been made a party, the court of first instance dismissed the suit. The decree of that court has been affirmed by the lower appellate court. The plaintiff has preferred this appeal, and it is contended on his behalf that the claim ought not to have been totally dismissed.

There can be no doubt that Narain Singh, as subsequent mortgagee of a portion of the mortgaged property, had an interest in the equity of redemption and was, therefore, a necessary party within the meaning of order XXXIV, rule 1, of the Code of Civil Procedure. The effect, however, of the omission of Narain Singh from the suit was, in our opinion, not the total dismissal of the suit, but only of so much of it as related to the 1 biswa, 10 biswansis, of which Narain Singh is a subsequent mortgagee. There still remains the remaining 2 biswas, 10 biswansis and as to this, the omission of Narain Singh did not affect the claim. The plaintiff, if he is entitled to a decree, is entitled to realize the amount of his mortgage from the remainder of the mortgaged property. The courts below ought, therefore, to have tried the case as between the persons who were parties to the suit in respect of the portion of the mortgaged property which was unaffected by the subsequent mortgage in favour of Narain Singh and the plaintiff.

We accordingly allow the appeal, set aside the decrees of the courts below and remand the case to the court of first instance with directions to readmit it under its original number in the register and to try it on the merits. If the court finds that the plaintiff is entitled to a decree, the decree should be confined to the $2\frac{1}{2}$ biswas which are not comprised in the mortgage of the 28th of June, 1895. Costs here and hitherto will abide the event.

Appeal decreed and cause remanded.

PRIVY COUNCIL.

PARTAB SINGH AND ANOTHER (PLAINTIFFS) v. BHABUTI SINGH
(DEFENDANT).

[On appeal from the Court of the Judicial Commissioner of Oudh, at
Lucknow.]

Minor—Representation of minor in suits—Suit to set aside compromise of and decrees in suits to which minors were parties—Civil Procedure Code (1882), sections 443, 456, 452—Minors unrepresented owing to fraud and misrepresentation of de facto guardian whose interest conflicted with theirs—Form of decree—Civil Procedure Code (1908), section 98—Act No. I of 1877 (Specific Relief Act), section 42—Question of law.

In this case the appellants sued for a declaration that a compromise of certain pre-emption suits and decrees based thereon, made on their behalf in 1899 when they were minors, were not binding on them having been obtained by the fraud and misrepresentation of the respondent (who was then their *de facto* guardian and manager of their property) and in proceedings in which they were practically unrepresented; and they prayed that they might be restored to the position held by them prior to the date on which the compromise and decrees were made. It appeared that, although the appellants were described in the proceedings as "under the guardianship" of one H. P., he had never been properly appointed their guardian *ad litem* by the Court as required by section 443 of the Civil Procedure Code, 1882: that no *bond fide* application had ever been made under section 456 to have a guardian *ad litem* appointed by the Court; and that the leave of the Court had not been obtained to enter into the compromise on the appellant's behalf as was necessary under section 462.

Held that the appellants were entitled to the declaration they sought. H. P. had, their Lordships found, been introduced into the suits of 1899 by the respondent as the guardian or next friend of the appellants to advance the interests of the respondent and to defeat the interests of the appellants, which conflicted with those of the respondent: he had throughout acted under the directions and on behalf of the respondent and in his interest and contrary to the interests of the appellants, and the respondent had taken advantage of his position to the detriment of the appellants. There was therefore no one to protect them, and they were unrepresented in the proceedings, which were therefore not binding on them. *Mánohar Lal v. Jadunath Singh* (1) followed.

Section 42 of the Specific Relief Act (I of 1877) which had been applied to the case by the majority of the Court of the Judicial Commissioner was held not to be applicable.

Semble the question whether on certain stated facts the relief which the appellants prayed for should be granted or refused, was a question of law within the meaning of section 98 of the Civil Procedure Code (Act V of 1908); and where, on a difference of opinion on that question between two Judges of the

* *Present* :—Lord ATKINSON, Lord PARKER, Sir SAMUEL GRIFFITH, Sir JOHN EDGE and Mr. AMBER ALI.

(1) (1906) I. L. R., 28 All., 585: L. R., 33 I. A., 128.

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Court, the case was referred under that section to a third Judge, that was the only question he had jurisdiction to consider and decide.

APPEAL from a judgement and decree (14th March, 1910) of the Court of the Judicial Commissioner of Oudh, which reversed the judgement and decree (29th July, 1908) of the Subordinate Judge of Sitapur, and dismissed the suit of the appellants.

The suit was brought on the 22nd of February, 1908, for a declaration that an agreement of compromise, dated the 15th of December, 1899, entered into on the plaintiffs' behalf during their minority, and two decrees based thereon were not binding on them; the plaint alleging in effect that the compromise, and consequent withdrawal of two suits for pre-emption (the subjects of the compromise) were fraudulent, inasmuch as one Hari Prasad, who acted in the said suits on behalf of the plaintiffs and was a subordinate and under the orders of their then guardian *de facto* the defendant Bhabuti Singh (now the sole respondent), had never been properly appointed by the Court as their guardian *ad litem*, and the Court's sanction to the compromise had been obtained by misrepresentation. The relief claimed was that the plaintiffs might be restored to the position held by them prior to the 15th of December, 1899, the date on which the two decrees were passed.

Bhabuti Singh was the only defendant who appeared, and, so far as is now material, his defence was that the plaintiffs were independently represented by Hari Prasad who had acted in their best interests by withdrawing their suit and entering into the compromise; and that the withdrawal, having received the sanction of the Court, could not be disturbed.

The circumstances prior to the suit and leading up to the compromise will be found fully stated in the judgement of their Lordships of the Judicial Committee.

The Subordinate Judge decreed the suit with costs making the declaration as sought by the plaintiffs.

From that decree the defendant preferred an appeal, which was heard by the Judicial Commissioner (Mr. E. CHAMIER) and the First Additional Judicial Commissioner (Mr. L. G. EVANS), who differed in opinion, the former holding that the appeal ought to be dismissed, and the latter being of opinion that it should be allowed and the relief claimed refused to the plaintiffs. Mr. CHAMIER said;

"I hold that the plaintiffs were not effectively represented in the suits of 1899. Their *de facto* guardian was their opponent, who used his position to bring about a compromise much to his own advantage and to the detriment of the minors. I think there can be no doubt that the plaintiffs are not bound by such proceedings."

And to a contention that the Court had a discretion to give or refuse relief under section 42 of the Specific Relief Act (I of 1877), and that relief should in their case be refused on various grounds he said:

"I think there can be little doubt that the plaintiffs had not funds in hand wherewith to purchase the property. If the cases had been fought out, the minors would have got a decree for pre-emption. Bhabuti Singh also would, according to the practice of the court, have been given a decree for pre-emption in case the minors did not pay the purchase money within the time limited by their decree. Bhabuti Singh would have been under no obligation to raise money on his personal security for the minors in order to enable them to take advantage of the decree and he would have been unable to mortgage their property for the purpose even if he had been so minded. It is clear therefore that Bhabuti Singh would have done nothing to prevent the dismissal of the minors' suit. Had Bhabuti Singh adopted this course such a suit as the one before us could never have been brought. . . . I think it is a question whether such a suit as this is brought under section 42 of the Specific Relief Act, and whether we can in the exercise of our discretion refuse relief to the plaintiffs; but assuming that the suit is brought under that section I am of opinion that we ought to give the plaintiffs relief. . . . As for the argument that as Bhabuti Singh was under no obligation to claim pre-emption on behalf of the minors he was at liberty to direct Hari Prasad to withdraw their suit and their defence, I need only say that it is quite clear that a guardian is not entitled to use his ward's rights as a means of procuring an advantage for himself. A suit for pre-emption was filed on behalf of the minors. It was not disposed of according to law, but was suppressed for the benefit of the minors' guardian. In my opinion the Court was right in decreeing the plaintiffs' claim."

Mr. EVANS agreed generally with the facts found by the Judicial Commissioner, but said,

"In the present case the most that can be found against the defendant is that he used the rights of the minors to obtain some personal advantage. He did not allow any fraudulent decree to be passed against them, nor did he allow them to be unjustly deprived of any property. It appears to me that it would be an improper exercise of the discretion of this Court to allow the plaintiffs to reopen this litigation, which terminated in 1899, merely because their *de facto* guardian did not see fit to prosecute a claim for pre-emption on their behalf, especially when it is not proved that there were any funds in his possession belonging to the minors for investment in immovable property . . . I hold that this is pre-eminently a case in which the Court should not

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exercise the discretion vested in it by section 42 of the Specific Relief Act and should refuse to grant the relief prayed for. I would allow the appeal, and dismiss the claim."

The Court of the Judicial Commissioner on the same day made the following order under section 98 of the Civil Procedure Code (Act V of 1908).

"We are both agreed that the sanction of a court does not validate a compromise which is invalid on other grounds.

"We are also agreed that Bhabuti Singh was the *de facto* manager of the minors' property, that he was not obliged to institute a suit for pre-emption on their behalf, that he caused the suit for pre-emption to be instituted on their behalf in order to protect himself against other claimants, that Hari Prasad in withdrawing the minors' suit and joining in the compromise acted under Bhabuti Singh's instructions, that if the cases had been fought out lots would have been drawn as regards the share in Khushalpur, the minors would have obtained a decree for pre-emption of the share in Ismailganj and Bhabuti Singh would have been given a decree for pre-emption in case the minors did not pay the purchase money within the time limited by their decree, that Bhabuti Singh had funds wherewith to take advantage of the decree, that the minors had no funds and Bhabuti Singh was under no obligation to raise funds for them.

"On these facts one of us is of opinion that the plaintiffs should be given a declaration that the compromise and decrees are not binding on them and that they are remitted to their original rights; the other is of opinion that the suit should be dismissed. The point on which we differ is certainly not a question of fact. After hearing counsel for the parties we hold that it is a point of law within the meaning of section 98 of the Code of Civil Procedure and we accordingly direct that the appeal be laid before the second Additional Judicial Commissioner under that section."

The matter was therefore re-argued before the Second Additional Judicial Commissioner (Mr. T. C. PIGGOTT), who agreed substantially with the First Additional Judicial Commissioner, being of opinion that the only facts with which the Court trying the case was not acquainted at the time when it accepted the compromise of the 15th of December, 1899, were that the suit for pre-emption in which the minors were plaintiffs (177 of 1899) had never been seriously intended to succeed, and that a decree for pre-emption in favour of the plaintiffs in that suit would, so far as can now be ascertained, have resulted in no benefit to the latter. In my opinion the case for the plaintiffs breaks down because these were not material facts from the point of view of the decision of the suits of 1899, and because their concealment on the part of Bhabuti Singh, if it was fraudulent at all, was not a fraud on the

minor plaintiffs but on certain other possible pre-emptors who might have been thereby discouraged from asserting their right.

The appeal from the Subordinate Judge was therefore allowed and the suit dismissed with costs in both Courts.

On this appeal—

Arthur Grey and *R. Jacob* for the appellants contended that they were not effectively represented in either of the suits for pre-emption in 1899, and that the respondent used his position as their guardian to bring about a compromise much to his own advantage, and to the detriment of the appellants. That was the finding of the Judicial Commissioner, and it was submitted that it was correct, and that he was right in holding that the appellants were not bound by such proceedings. Though they were described as under the guardianship of Hari Prasad, he was never appointed their guardian *ad litem* by any order of the Court as required by section 443 of the Civil Procedure Code, 1882; and admittedly no *bond fide* application was ever made for that purpose under section 456. The compromise was signed by Hari Prasad as guardian of the appellants, but no sanction of the Court to it was ever asked for or obtained as required by section 462 of the Code. Reference was made to *Manohar Lal v. Jadunath Singh* (1), in which under similar circumstances it was declared that a compromise was not binding, and the minors were remitted to their original rights. In the appellate Court the effect of the findings and judgements of the Judicial Commissioner and the First Additional Judicial Commissioner was that under section 98 of the Civil Procedure Code, 1908 (corresponding with section 575 of the Code of 1882) the appeal stood dismissed, and the decree of the Subordinate Judge confirmed. The exercise of the discretion of the Court to grant or refuse relief to the plaintiffs under section 42 of the Specific Relief Act (I of 1877) was not a point of law within the meaning of section 98 of the Code, and a difference of opinion between the Judges on that point did not justify the reference of the case to a third Judge, even if the Court, after having delivered judgement had power to refer the case at all to another Judge, which it was submitted it had not: *Lal Singh v. Ghansham Singh* (2) was referred to. The Second Judicial

(1) (1906) I. L. R., 28 All., 585 (589); (2) (1887) I. L. R., 9 All., 625 (642).

L. R., 83 I. A., 129 (132).

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Commissioner exceeded his powers in coming to any finding apart from the specific point of law (assuming it was such) referred to him, and his judgement was, so far, irrelevant. Upon the facts found by the Bench of two Judges who first heard the appeal, the appellate Court had no discretion to refuse the relief claimed by the appellants. Their omission to ask in terms that the decree in their pre-emption suit should be set aside did not disentitle them to relief in the form of the declaration they sought. Reference was made to *Isri Dut Koer v. Hansbutti Koerain* (1). Even if such a discretion existed, it had been exercised by the Subordinate Judge in favour of the appellants and no sufficient reasons had been given for interfering with his exercise of discretion as the decree appealed from had done.

[*De Gruyther, K. C.*, said he did not contend that section 42 of the Specific Relief Act had any application at all to the case.]

De Gruyther, K. C. and *G. R. Lowndes*, for the respondent contended that the dismissal of the pre-emption suit in which the appellants were plaintiffs was not procured by any fraud upon them by the respondent; that had been found by the judgement appealed from. Nor had the dismissal of that suit been shown to have been in any way prejudicial to the interests the appellants then had. If that suit had been contested to the end, the appellants would have been unable to take advantage of any decree that might have been passed in their favour. There was also in the evidence recorded in the present suit nothing to show that the said suit of 1899 was not instituted *bond fide* in the interests of the appellants. The present suit, it was submitted, having been filed for the purpose of obtaining a declaratory decree only, was bad in form, inasmuch as it did not pray that the decree in the suit of 1899 in which the appellants were plaintiffs should be set aside. But, assuming that it was rightly framed in asking only for a declaratory decree, the Court had a discretion as to granting or refusing such declaration, and that discretion had been properly exercised by the appellate Court, because the appellants were not under the circumstances of the case entitled to the relief they claimed. Reference was made to the Oudh Laws Act (XVIII of 1876), sections 6 and 9, as to the nature and extent of rights of

(1) (1883) I. L. R., 10 Cal., 324 (322): L. R., 10 I. A., 150 (156).

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pre-emption as having preference over other claims, though the period of time within which they must be brought was limited, namely, one year from the date of sale. The appeal should be dismissed.

Arthur Grey replied.

1913, July 23rd :—The judgement of their Lordships was delivered by Sir JOHN EDGE :—

The suit in which this appeal from a decree of the court of the Judicial Commissioner of Oudh has arisen was brought by Kunwar Partab Singh and Kunwar Ahbaran Singh in the Court of the Subordinate Judge of Sitapur against Bhabuti Singh and others on the 22nd of February, 1908. The plaintiffs, who are the appellants here, sought by their suit to have it declared that a decree which was made on the 15th of December, 1899, in a suit for pre-emption which had been brought by Bhabuti Singh, who is respondent here, on the 26th of June, 1899, against certain vendees and others, and in which the appellants, who were then minors, had been added as defendants, was not binding as against them. The plaintiffs appellants also sought in this suit to have a decree set aside which had been made on the 15th of December, 1899, in a suit for pre-emption which had been brought on the 27th of July, 1899, by them under the guardianship of one Hari Prasad against vendees and others and in which Bhabuti Singh had been added as a defendant, and they claimed to be restored to the position which they had held prior to the 15th of December, 1899, and such other relief as they were entitled to.

The material facts which their Lordships find are briefly as follows. The plaintiffs were the sons of Raja Balbhaddar Singh, who died on the 27th of December, 1897. The property of the joint family consisted of, amongst other things, shares in Mahal Ismailganj and Mahal Khushalpur, in respect of which Raja Balbhaddar Singh was at his death recorded in the Revenue Papers as the proprietor. After the death of Raja Balbhaddar Singh the defendant respondent, Bhabuti Singh, assuming to act as the guardian of the plaintiffs and as the manager of their property, obtained in April, 1898, mutation of names in the Revenue Papers in their favour. Syed Muhammad Ismail, Syed Idrur Hasan and Syed Mohammad Sadiq on the 3rd of August, 1898, sold certain shares in mahal Ismailganj and mahal Khushalpur

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to Munshi Niaz Ahmad, Babu Ram and Bhagwan Das. It was in respect of that sale that the suits for pre-emption of the 26th of June, 1899, and the 27th of July, 1899, were brought. The vendors and the vendees were original defendants to these suits. Bhabuti Singh had a right of pre-emption equal but not superior to the right of pre-emption of Partab Singh and Ahbaran Singh in respect of the shares which were sold in Mahal Khushalpur, and he had a right of pre-emption inferior to theirs in respect of the shares which were sold in Mahal Ismailganj. It is obvious that the interests of the minors Partab Singh and Ahbaran Singh conflicted with the interests of Bhabuti Singh. On the 26th of June, 1899, Bhabuti Singh, on his own behalf, brought a suit to pre-empt the shares which had been sold in the two mahals, and made the vendors and vendees defendants to the suit. On the 5th of August, 1899, Bhabuti Singh caused Partab Singh and Ahbaran Singh, who were then minors, to be added as defendants to that suit. According to the amended plaint, Partab Singh and Ahbaran Singh, minors, under the guardianship of Hari Prasad, were added as defendants under an order, dated the 5th of August, 1899. The Court appears to have made an order on the 5th of August, 1899, that Partab Singh and Ahbaran Singh should be added as defendants, but it does not appear that the Court had ordered that they should be added as defendants under the guardianship of Hari Prasad. The amendment of the plaint adding Partab Singh and Ahbaran Singhas defendants was not attested by the signature of the Judge. No order appointing Hari Prasad as a guardian for the suit for Partab Singh or Ahbaran Singh was applied for or was made. By section 443 of the Code of Civil Procedure, 1882, it was enacted that—

“Where the defendant to a suit is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor, to put in the defence for such minor, and generally to act on his behalf in the conduct of the suit.”

By section 441 of the same Code it was enacted that—

“Every application to the Court on behalf of a minor (other than an application under section 449) shall be made by his next friend, or by his guardian for the suit.”

The result is that the minors, Partab Singh and Ahbaran Singh, were not in law represented in the suit which was brought by Bhabuti Singh.

On the 27th of July, 1899, Bhabuti Singh, who was then the *de facto* guardian of the minors Partab Singh and Ahbaran Singh, and the manager of their property, caused a suit for pre-emption in respect of the sale of the 3rd of August, 1898, to be brought by Partab Singh and Ahbaran Singh under the guardianship of Hari Prasad against the same vendors and vendees who were defendants to the suit of the 26th of June, 1899. The shares which it was sought to pre-empt by the suit of the 27th of July, 1899, were the same shares which it had been sought to pre-empt by the suit of the 26th of June, 1899. On the 7th of August, 1899, Bhabuti Singh was added as a defendant to the suit of the 27th of July, 1899. On the 27th of July, 1899, Hari Prasad had in the suit in which Partab Singh and Ahbaran Singh were the plaintiffs filed an application to be appointed their guardian *ad litem*. The application purported to be made under section 456 of the Code of Civil Procedure, 1882. The Subordinate Judge to whom the application was made, by his order of the 27th of July, 1899, held that the application was unnecessary, and directed that the costs should be borne by the plaintiffs in that suit in any event.

Bhabuti Singh, the vendors, the vendees, and Hari Prasad, professing to act on behalf of Partab Singh and Ahbaran Singh, entered into an agreement of compromise, and on the 15th of December, 1899, filed in the suit in which Bhabuti Singh was the plaintiff a petition in which it was stated that it was agreed that Bhabuti Singh should pay Rs. 15,000 without costs to the vendees, and that a decree for possession of the property sold should be passed in favour of Bhabuti Singh by right of pre-emption. On that petition the then Subordinate Judge passed a decree in that suit in favour of Bhabuti Singh. As Hari Prasad had not been appointed guardian for the suit for the minors Partab Singh and Ahbaran Singh, they were in law unrepresented, and the decree did not bind them. Further, Hari Prasad had not obtained the leave of the Court to enter into that agreement of compromise on behalf of the minors Partab Singh and Ahbaran Singh.

In pursuance of the agreement of compromise to which their Lordships have referred, Hari Prasad, professing to act as guardian of the minors Partab Singh and Ahbaran Singh, on the 15th of December, 1899, presented to the Court a petition in the suit in

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which Partab Singh and Ahbaran Singh were the plaintiffs, in which it was stated that it had been settled between the parties that a decree should be passed in favour of Bhabuti Singh in his suit; that the compromise had been filed in Court; and that Partab Singh and Ahbaran Singh were willing to withdraw their claim; and it was prayed that the withdrawal of their claim should be sanctioned, and that their suit should be dismissed. That petition was signed by Hari Prasad, Bhabuti Singh, the vendors, and the vendees. Hari Prasad appeared in Court in support of that petition, and stated that:—"Since Bhabuti Singh has acquired this *hakkiat* on the basis of pre-emption, therefore the minors have now no objection, and they do not advance a claim to the said *hakkiat* as against Bhabuti Singh." On that petition the then Subordinate Judge dismissed the suit of Partab Singh and Ahbaran Singh. It does not appear that the Subordinate Judge was informed that the minors Partab Singh and Ahbaran Singh were in law unrepresented in the suit of the 26th of June, 1899, in which Bhabuti Singh had obtained a decree as against them and others for the pre-emption of the shares which Partab Singh and Ahbaran Singh were in their suit claiming to pre-empt; nor does it appear that the Subordinate Judge was informed that the petition for the dismissal of the suit of Partab Singh and Ahbaran Singh was made in pursuance of an agreement of compromise which Hari Prasad acting as next friend of the minors Partab Singh and Ahbaran Singh, had entered into without the leave of the Court. This Board has held in *Manohar Lal v. Jadunath Singh*, (1) that in cases to which section 462 of the Code of Civil Procedure, 1882, applies there ought to be evidence that the attention of the Court was directly called to the fact that a minor was a party to the compromise, and it ought to be shown, by an order on petition, or in some way not open to doubt, that the leave of the Court was obtained, and that it is not sufficient proof that the exigencies of section 462 were complied with to show that the minor was described in the title of the suit as a minor, as in that case, suing "under the guardianship of his mother," and that the terms of the compromise were before the Court. The agreement of compromise in pursuance of which Hari Prasad obtained the

(1) (1906) I. L. R., 28 All., 585; L. R., 33 I. A., 128.

dismissal of the suit of Partab Singh and Ahbaran Singh was void as against them and on that ground, if there were no other, they are entitled to have the decree dismissing the suit of the 27th of July, 1899, set aside,

Hari Prasad had been a karinda of Raja Balbhaddar Singh, and he acted in a subordinate capacity under Bhabuti Singh in the management of the property of Partab Singh and Ahbaran Singh after Bhabuti Singh assumed the guardianship of the minors. Their Lordships agree with the learned Judicial Commissioner that in the proceedings to which they have referred "Hari Prasad was a mere dummy, that there was no one to protect the interests of the plaintiffs (Partab Singh and Ahbaran Singh), and that in fact Bhabuti Singh took advantage of his position." Their Lordships find that Hari Prasad was introduced into the suits of 1899 by Bhabuti Singh as the guardian or next friend of the minors Partab Singh and Ahbaran Singh to advance the interests of Bhabuti Singh and to defeat the interests of Partab Singh and Ahbaran Singh, for whom previously and subsequently Bhabuti Singh was acting as guardian and as the manager of their property. Hari Prasad throughout acted under the directions and on behalf of Bhabuti Singh and in his interests, and contrary to the interests of Partab Singh and Ahbaran Singh and to their detriment. Upon these findings of fact it follows as an obvious conclusion that the compromise and the proceedings which were taken in pursuance of it were not binding upon Partab Singh and Ahbaran Singh, and it is clear, apart from the other considerations which their Lordships have already discussed, that Partab Singh and Ahbaran Singh are also on these findings of fact entitled to relief.

The Subordinate Judge of Sitapur in this suit gave Partab Singh and Ahbaran Singh a decree on the 29th of July, 1908. From that decree Bhabuti Singh appealed to the Court of the Judicial Commissioner of Oudh. The appeal was heard by a Bench consisting of the Judicial Commissioner and the First Additional Judicial Commissioner. The learned Judicial Commissioner, on the facts found by him, held that Partab Singh and Ahbaran Singh were entitled to the decree which they had obtained from the Subordinate Judge, and that the appeal should be dismissed with costs. The First Additional Judicial Commissioner agreed with

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Their Lordships are of opinion that this appeal should be allowed and the decree of the Court of the Judicial Commissioner should be set aside, and that the appellants, Partab Singh and Abharan Singh, should have a decree setting aside the decree of the 15th of December, 1899, in their suit, and declaring that the agreement of compromise and the decree of the 15th of December, 1899, in the suit of Bhabuti Singh are not binding upon them or either of them, and that they are entitled to such rights as they had before their suit was dismissed on the 15th of December, 1899. Their Lordships will advise His Majesty accordingly. Bhabuti Singh the respondent must pay the costs of this appeal and of his appeal to the Court of the Judicial Commissioner of Oudh.

Appeal allowed.
Solicitors for the appellants:—*Ranken Ford, Ford & Chester.*
Solicitors for the respondent:—*T. L. Wilson & Co.*

J. V. W.

APPELLATE CIVIL.

Before Mr. Justice Ryves and Mr. Justice Lytle.

BABU RAM (DEFENDANT) v. SAID-UN-NISSA AND OTHERS (PLAINTIFFS)*.

Act No. VIII of 1890 (*Guardians and Wards Act*), section 29—*Guardian and minor—Certificated guardian—Sale—Powers of certificated guardian*

different from those of a guardian under the general rule of law.

The powers of a certificated guardian are regulated and defined by the Guardians and Wards Act, and the rule of law, that, there being no mutuality

in a contract to which a minor was a party, it could not be enforced by him, does not apply to a contract for the sale of immovable property entered into by the

certificated guardian of a minor with the sanction of the Court; such a contract is valid and a suit for damages for breach of the contract will lie on behalf of the

minor. *Mr Sarwarjan v. Bakhruddin Mahomed Chowdhury* (1) distinguished.

THE facts of this case are set forth in the judgment of the Court; but, briefly, this was a suit for damages on account of the breach by the defendant of a contract to purchase certain immovable property, entered into with the certificated guardian of certain minors with the sanction of the Court. The property was subsequently sold by auction at less than the covenanted price;

* Second Appeal No. 42 of 1913 from a decree of D. L. Johnston, District Judge of Meerut, dated the 2nd of October, 1912, modifying a decree of Muhammad Hussain, First Additional Subordinate Judge of Meerut, dated the

24th of July, 1912.

(1) (1912) I.L.R., 39 Calo., 232.

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hence this suit to recover the balance. The court of first instance decreed the claim, with the exception of an item of Rs. 250. On appeal by the defendant the plaintiffs' cross-objection as to this item was allowed and the claim decreed in full. The defendant appealed to the High Court.

The Hon'ble Dr. Tej Bahadur Sapru and Dr. Satish Chandra Banerji, for the appellant.

Dr. S. M. Sulaiman and Maulvi Ghulam Muhyib, for the respondents.

RYVES and LYLE, JJ.:—Musammam Said-un-nissa, plaintiff No. 1, is the mother of the plaintiffs Nos. 2—6. Of these, Zia-un-Islam was a major and the rest were minors. Some property belonging to them was under attachment and had been advertised for sale in execution of a decree obtained against Sultan-ul-Haq, the deceased husband of Musammam Said-un-nissa and the father of the remaining plaintiffs. The mother was anxious to sell the property by private contract and applied to the District Judge to be appointed a certificated guardian of her minor sons. This application was granted on the 29th of July, 1911. On the 2nd of September, 1911, Babu Ram applied to the court for leave to purchase the property for Rs. 5,000. The Judge passed an order that "the applicant, plaintiff No. 1, is allowed to sell the shops at least for Rs. 5,000 to Babu Ram or anyone else who may offer a higher price. The draft of the deed should be filed for the approval of the court." This order was passed on the 15th of September, 1911. Subsequently a draft deed was prepared and was filed by the plaintiffs in the District Judge's court and the District Judge approved of that draft on the 31st of October. In that deed, the two major plaintiffs agreed to execute a sale-deed of their own shares, while Musammam Said-un-nissa entered into a similar contract as guardian of the minors for the sale of their shares in the property. This draft must be considered as an acceptance by the plaintiff of Babu Ram's offer to purchase the property for Rs. 5,000, and this acceptance, as found by the lower court, was duly communicated to Babu Ram. Subsequently, Babu Ram failed to carry out the contract and, in the result, the property was sold

Rs. 5,000 which Babu Ram contracted to pay for it, by way of damages for breach of contract. The first court decreed the suit with the exception of Rs. 250, which sum was claimed as costs involved in the auction-sale, on the ground that the alleged damage on this head was too remote. There was an appeal and a cross-objection before the learned District Judge. He dismissed the appeal, but allowed the cross-objection with reference to this sum of Rs. 250.

Before us it has been argued, first, that there was no complete contract between Babu Ram on the one hand and the plaintiff, Said-un-nissa, on the other. As we have already said, we have a finding of the learned District Judge on this point which is conclusive. It was then argued on the authority of *Mir Surwaryan v. Fakhruddin Mahomed Chowdhury* (1) that the plaintiff could not make a valid contract for sale of this immovable property on behalf of the minors. In the case in I. L. R., 39 Calcutta, what was laid down was that the manager, with whom their Lordships were then concerned, could not bind the minor or the minor's estate by a contract for purchase of immovable property, and that, as the minor was not bound by the contract, there was no mutuality, and that the minor, who had attained majority at the date of suit, could not claim specific performance. It was not shown in that case that the manager was the certificated guardian of the minor, and, even if he was, that he had obtained sanction of the court under section 29 of the Guardians and Wards Act to enter into a contract on behalf of the minor. A certificated guardian's powers are regulated and defined by Statute, namely, the Guardians and Wards Act. In the present case, the contract was entered into by a certificated guardian after receipt of the Court's sanction and the suit is for damages for breach of a contract so entered into. In our opinion the Privy Council ruling does not apply to the facts of the present case. We do not think the Privy Council ruling applies to guardians appointed by Statute, such as the Guardians and Wards Act or the various Court of Wards Acts. The third objection taken is that the lower court should not have allowed the item of Rs. 250. In our opinion, for the reasons given by the lower court, its decree was justified. We dismiss the appeal with costs.

Appeal dismissed.

(1) (1912) I. L. R., 39 Calcutta, 232.

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unchastity imputed to the plaintiff had been established and held that the property had been the self-acquired property of Mohan Singh, inasmuch as he had obtained it personally as a grant from the Government. On the question of fraud the court below states:—‘The plaintiff alleges that she acceded to the compromise on account of misrepresentations that were made to her. No misrepresentation was proved, and if it was necessary for her to establish this contention her suit and the present appeal must certainly fail.’ In the latter part of the judgement the learned Judge further observes:—‘In the case now under consideration there is nothing to show what the circumstances were in which the compromise was arrived at.’ The learned Judge was further of opinion that ‘the compromise amounted to a transfer of a right to immovable property such as could only be effected by means of a registered instrument.’ The compromise in the present case was simply an application put in the Revenue Court. It was not registered. On these findings the lower appellate court decreed the plaintiff’s suit. The plaintiff’s suit had included a claim for mesne profits, the amount of which was not ascertained in the court of first instance, and the lower appellate court, without noticing this omission, gave the plaintiff a decree for the full amount claimed. In appeal to this Court this last point is also one of the grounds taken in the memorandum of appeal. It is contended on behalf of the appellant that this petition to the Revenue Court should be looked upon in the nature of a family settlement on which the court should act, and I am referred to a ruling of their Lordships of the Privy Council in *Khunni Lal v. Gobind Krishna Narain* (1) and to another case, *Madan Lal v. Chhuttan Singh* (2). With reference to the view of the court below that the document was one requiring registration it is pointed out that the petition to the Revenue Court is not relied on as a deed of transfer of immovable property, but simply as evidence of the agreement between the parties as to how the entry in the Government papers should be made of their respective rights thereto. A further ground taken is that the suit is barred by limitation inasmuch as the plaintiff comes in eight years after the settlement of 1903. Finally it is contended that the conduct of the plaintiff is such as to operate as estoppel in favour of defendant No 1. The ruling referred to in the judgement of the lower appellate court, *Rustam Ali Khan v. Gaura* (3), does not, in my opinion, bear on the present case. In that case there was a dispute between the plaintiff and her two sisters in the matter of mutation of names in the Revenue Court. A compromise was entered into and the compromise dealt with other properties, over and above the landed property in respect of which the Revenue Court was concerned with in the mutation proceedings, and it was held that in respect of this latter property the compromise could have no effect, inasmuch as the document of compromise had not been registered. It was observed in the course of the judgement that, as bearing on the issues raised in the case, the proceedings before the Revenue Courts, including the petition of compromise and the orders passed by the court, were undoubtedly admissible in evidence and must be taken into account for what they may be worth. In my opinion the contention advanced on behalf of the appellant in respect of the compromise is correct and

(1) (1911) I. L. R., 33 All., 356.

(2) (1912) 10 A. L. J., 101.

(3) (1911) I. L. R., 33 All., 728.

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must be sustained. By the petition to the Revenue Court neither of the parties thereto purported to convey any property. The petition simply contained a statement by the parties that they agreed that each should be recorded in respect of one-half of the property in dispute. Such documents are put in every day in the Revenue Courts and so far as my experience goes registration of such instruments is not insisted on. If then registration of this document is not necessary, it can be looked to as evidence of the agreement between the parties so far back as 1903. The plaintiff alleged that the compromise, as it is called, had been obtained from her by means of fraud, misrepresentation, &c. As I understand the judgements of the courts below the plaintiff made no attempt to lay even the foundation of a case of fraud or misrepresentation, and there is undoubtedly a clear finding by the lower appellate court that no fraud or misrepresentation was proved. The settlement of the dispute between the parties embodied in the application to the Revenue Court was a good agreement and is good evidence of what the parties considered should be done in the dispute they were engaged in. This being the case and nothing having happened subsequent to this agreement which would give the plaintiff any right to resile from it, I must hold that the plaintiff's suit is not maintainable. I allow the appeal, set aside the decree of the lower appellate court and dismiss the plaintiff's suit with costs in all courts."

The plaintiff appealed.

The Hon'ble Pandit *Moti Lal Nehru*, for the appellant.

The Hon'ble Dr. *Sundar Lal* and Dr. *Satish Chandra Banerji*, for the respondents.

RICHARDS, C. J. and BANERJI, J.—The facts out of which this appeal arises are fully set forth in the judgement of the learned Judge of this Court which is reported in 11 A. L. J. R., 157. To put them very shortly, the dispute is about a moiety of the property which at one time belonged to Mohan Singh. Mohan Singh died in 1903, leaving a brother, Ram Prasad Singh, and a widow, Musammat Kokla, the plaintiff in the present suit. They were disputing about the estate of Mohan Singh. Ram Prasad Singh alleged that he was joint with Mohan Singh, whilst Musammat Kokla said that Mohan Singh was separate. The dispute ended by the parties agreeing that half the property should be recorded as belonging to Musammat Kokla, whilst the other half should be recorded as belonging to Ram Prasad Singh. Later on, Ram Prasad sold the half share that stood in his name, whilst Musammat Kokla sold the half that stood in her name. She then brought the present suit to recover the half that had stood in Ram Prasad's name and had been sold by him. The lower appellate court has found that Mohan Singh and Ram Prasad

Singh were separate, but it has also found that it was not established that any fraud or misrepresentation had been practised on Musammat Kokla and accordingly decreed her suit.

The learned Judge of this Court held that under the circumstances the petition filed in mutation proceedings must be regarded as a family settlement and it did not require registration, and on these grounds dismissed the plaintiff's suit.

In our opinion, it must be presumed from the whole proceedings commencing with the petition for mutation, the order of the revenue authorities recording the names in accordance with the petition, and the subsequent sales upon the strength of this record, that the parties entered into a family arrangement. On these grounds we think the decree of the learned Judge of this Court ought to stand. We, therefore, dismiss the appeal with costs.

Appeal dismissed.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Sir Pramada Charan Banerji.

SRI KISHAN DAS AND ANOTHER (PLAINTIFFS) v. YAKUB KHAN AND OTHERS (DEFENDANTS).*

Landlord and tenant—Tenant in possession without a patta—Suit to enforce hypothecation of property as security for rent.

Held that a hypothecation of other property by certain tenants as security for their rent was none the less enforceable because, though the tenants had executed a *kabuliat* in respect of the land held by them, no *patta* had been executed by the landlords in their favour. *Sheo Karan Singh v. Maharaja Parbhu Narain Singh* (1) referred to.

THIS was a suit to enforce a hypothecation of certain property executed by tenants as security for their rent. The tenants were in possession of the land leased to them, in respect of which rent was due, and had executed a *kabuliat* therefor; but no *patta* had been executed in their favour by the landlords, and upon this ground it was contended that no rent was legally exigible and the security was not enforceable. The court of first instance decreed the claim; but the lower appellate court gave effect to the defendants' contention and reversed this decree. The plaintiffs appealed to the High Court.

* Second Appeal No. 82 of 1913, from a decree of Abdul Hasan, Additional Subordinate Judge of Moradabad, dated the 21st of September, 1912, reversing a decree of Sidheshwar Mitter, Munsif of Amroha, dated the 23rd of September 1911.

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The Hon'ble Dr. Tej Bahadur Sapru, for the appellants.

The Hon'ble Pandit Moti Lal Nehru, for the respondents.

RICHARDS, C. J. AND BANERJI, J.—The decision of the court below in this case cannot be supported. Ismail Khan and Zarina Khatun were admittedly in possession of the property leased to them by the plaintiffs. To secure the rent which they agreed to pay for such use and occupation, they hypothecated their property. The present suit was one to enforce the hypothecation. The suit was clearly maintainable, and the court below was wrong in holding that because no *patta* was granted to the executants of the *kabuliat*, the rent agreed to be paid was not payable and the security for its payment could not be enforced. This case is similar in some respects to that of *Sheo Karan Singh v. Maharaja Prabhu Narain Singh* (1). We allow the appeal, set aside the decree of the court below and remand the case to that court under order XLI, rule 23, of the Code of Civil Procedure with directions to re-admit it under its original number in the register and to dispose of the other questions which arise in the case. The appellant must have the costs of this appeal. Other costs will follow the event.

Appeal decreed and cause remanded.

APPELLATE CRIMINAL.

Before Mr. Justice Tudball and Mr. Justice Ryves.

EMPEROR v. RAM NEWAZ.

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Act No. XLV of 1860 (*Indian Penal Code*, sections 37, 302, 304—*Murder—Culpable homicide not amounting to murder—Fatal assault with lathis by three persons acting in concert.*

Three persons, brothers, attacked with *lathis* a fourth, against whom they bore a grudge, and beat him with great severity, so that he died shortly afterwards. His skull was badly fractured, and numerous other injuries were inflicted upon him. It did not appear which injuries were caused by which of the assailants, but the evidence showed that they were acting in concert and intended to cause such bodily injury as was likely to cause death. Held that all three assailants were guilty of murder. *King-Emperor v. Subbappa Chunnappa* (2) and *King-Emperor v. Kanhai* (3) followed *Emperor v. Bhola Singh* (4), *Queen Empress v. Duma Baidya* (5), *Gouridas Namasudra v. Emperor* (6), *Empress v. Dharam Rai* (7) and *Dhian Singh v. King Emperor* (8) distinguished.

* Criminal Appeal No. 401 of 1913 by the Local Government from an order of Pitambar Joshi, Sessions Judge of Banda, dated the 5th of March, 1913.

(1) (1909) I. L. R., 31 All., 276.

(5) (1896) I. L. R., 19 Mad., 483.

(2) (1912) 15 Bom. L. R., 303.

(6) (1908) I. L. R., 36 Cal., 659.

(3) (1912) I. L. R., 35 All., 329.

(7) Weekly Notes, 1887, p. 236.

(4) (1907) I. L. R., 29 All., 282.

(8) (1912) 9 A. L. J., 180.

THIS was an appeal by the Local Government from an order of acquittal passed by the Sessions Judge of Banda in the case of one Ram Newaz, charged under sections 304 and 302 of the Indian Penal Code, with being concerned, along with his two brothers Ram Bharose and Ram Bisal, with causing the death of one Ram Saran. The facts of the case are set forth at length in the judgement of the Court.

The officiating Government Advocate (Mr. W. Wallach), for the Crown.

Mr. D. R. Sawhny, for the accused.

TUDBALL and RYVES, JJ.:—This is an appeal by the Local Government from a decision by the Sessions Judge of Banda, whereby he acquitted one Ram Newaz of the offences of murder and culpable homicide not amounting to murder under sections 302 and 304 of the Indian Penal Code. The accused was committed for trial together with his two brothers, Ram Bharose and Ram Bisal, on a charge under section 304 of the Indian Penal Code. The Sessions Judge added a charge under section 302 of the Indian Penal Code. He convicted Ram Bharose and Ram Bisal of the lesser offence under section 304 of the Indian Penal Code and acquitted them of murder. He sentenced them to ten years' rigorous imprisonment each.

In regard to Ram Newaz, though he found that he was present and took part in the assault on the deceased, he passed an order of acquittal. Ram Bharose alone appealed against his conviction.

A Bench of this Court (of which one of us was a member), on the record coming before it, issued notice to both Ram Bharose and Ram Bisal to show cause why they should not be convicted of murder and the sentences enhanced. In the result, the appeal of Ram Bharose was dismissed, the two men were convicted of murder and were sentenced to death. The case of Ram Newaz was not then before the Court and his guilt or innocence was not considered. The Local Government has now appealed against his acquittal, and we have to decide whether or not his alleged participation in the assault has been proved and, if so, of what offence he is guilty.

The case for the prosecution is a simple one. The evidence of Ram Dat and Sub-Inspector Wali Muhammad Khan shows

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that Ram Bharose trespassed in the house of one Jasodia for the purpose of committing adultery with her daughter. On an alarm being raised, some neighbours arrived upon the scene, seized Ram Bharose and beat him. The deceased Ram Saran was one of them. Ram Bharose was prosecuted and convicted and sentenced in December, 1912, to four weeks' rigorous imprisonment, from which he was released some time in January last.

The case for the prosecution is that on the 24th of January, 1913, shortly before sunset, the three brothers, Ram Bharose, Ram Bisal and Ram Newaz met the deceased Ram Saran near a tank outside the village in which they all reside. The deceased was returning home from a neighbouring village. The three brothers were armed with *lathis*. They at once attacked Ram Saran, felled him to the ground and continued all three to beat him with their clubs as he lay. The witnesses, Gajadhar *Bharbunja*, Sheonath *Arack* and Sheonarain *Brahmin*, who were not far away, were attracted to the spot, and on their remonstrance the accused ran away. The relations of the deceased were summoned, and they removed the body. Ram Kishore, the brother of the deceased, proceeded to the police station, some eight miles distant, where at 8 p.m. a report was made as against all three of the accused. The presence of the witnesses, Sheonath and Gajadhar, at the scene, was also mentioned. Ram Saran died that same night as a result of the injuries inflicted by the three accused.

The medical evidence shows that the deceased was mercilessly and brutally beaten with clubs. On the crown of the head, there were two contused wounds and innumerable abrasions. One blow had been inflicted behind the right ear. On each arm there were two contused wounds and there was an injury to the left hand. There were marks of injuries on both knees and the mark of a blow on the waist. There was compound fracture of both bones of the left lower leg. The skull was found to have been fractured into four pieces. It is, therefore, evident that the deceased, as the medical witness states, had been cruelly beaten with *lathis*.

As to the actual facts of the assault, they are proved by the evidence of the witnesses, Gajadhar and Sheonath and Sheonarain. These are persons of different castes, and there is not a word in the evidence to show that they are otherwise than impartial.

witnesses who have testified to the facts to the best of the ability of ignorant villagers. There are no doubt some trivial minor discrepancies, but none of such importance as to throw any doubt on their honesty or good faith. The evidence of Gajadhar shows that, while grazing his cattle that evening on the embankment of the tank, he noticed Ram Saran walking along at the foot of the embankment. He also saw the three brothers walking along the top of it. The next thing he noticed was that the three accused were beating Ram Saran at the foot of the embankment. He shouted to Sheonath, who was on the other side of the embankment, and the latter and also the witness Sheonarain ran up to see what was happening. Sheonath states that when he caught sight of the scene, the deceased was on the ground and the three accused were all striking him with their *lathis*. On the witnesses remonstrating, the accused persons ran away. Sheonarain corroborates. The witnesses admit that Ram Saran had a *lathi* and this is obvious by reason of the fact that one accused, Ram Bisal, bore the marks of two blows on his person when at 8 p.m. he arrived at the police station and made a report. Of course it is possible that he might have caused these two injuries to be inflicted on his person by his brothers, but it is far more probable that Ram Saran, when attacked, used his weapon in self-defence. Ram Bisal reported that he had found Ram Saran allowing his cattle to graze on the crops in his field (which is some 200 yards or more from the tank) and when he attempted to remove them Ram Saran called to his three brothers, who arrived and drove off the cattle, while Ram Saran himself struck Ram Bisal twice with his *lathi*. This was the case put forward by Ram Bisal in his defence, and in the judgement on his appeal the reasons for holding it to be false are set forth. The police officer who made the inquiry found blood stains at the foot of the embankment, which clearly indicate the spot where Ram Saran was beaten. This story, moreover, is clearly untrue and does not account in any way for the numerous and severe injuries found on the body of the deceased. We are here, however, concerned with the case of Ram Newaz. There can be no doubt of the truth of the prosecution story. The Judge and the assessors were unanimous in accepting it.

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The defence of Ram Newaz was an *alibi*. The assessors stated that they accepted it. The Judge refused to do so, and held that Ram Newaz was present but probably did not take a prominent part in the assault. Ram Newaz gave his age as twenty years in the Magistrate's court. At the trial he said he was sixteen years old. His exact age is not clear, but we may take it that he is a young man approaching twenty years in age.

He called two witnesses to establish his *alibi*, one a Brahman and one an Arack, from the village of Tam Bani where his maternal uncles live. They say that one and a half months prior to their giving evidence the accused went to the village and stayed some twenty or twenty-two days with his uncle. Their village is some sixteen miles from the scene of the murder.

In addition to the reasons given by the Sessions Judge for not accepting this evidence, there is the fact that it is of a very vague and unreliable nature, and in the face of the clear evidence for the prosecution we are unable to accept it. We agree with the Judge that Ram Newaz was present and took part in the assault. The witnesses ascribe to him the same action as to the other two accused. Being the youngest of the three brothers, he may perhaps have been led into the matter by them, but we fail utterly to understand why the lower court acquitted him. He was present and actively aiding and abetting his brothers. The mere suggestion that he probably did not take a prominent part as the Sessions Judge has put it, is no good reason for acquittal, and we have, therefore, no hesitation in holding that Ram Newaz was present and did take part, using his *lathi* to beat the deceased. It is urged, on his behalf, that he can only be held guilty of an offence under section 325 of the Indian Penal Code and our attention is called to the decisions reported in *Emperor v. Bhola Singh* (1), *Queen-Empress v. Duma Baidya* (2) and *Gouridas Nama-sudra v. Emperor* (3), *Empress v. Dharam Rai* (4), *Dhian Singh v. King-Emperor* (5). In this respect, we must point out that the facts and circumstances of cases vary and each case has to be decided in view of its actual facts. We have pointed out that the deceased was cruelly and mercilessly beaten by three men armed

(1) (1907) I. L. R., 29 All., 282.

(2) (1896) I. L. R., 19 Mad., 483.

(3) (1908) I. L. R., 36 Calo., 659.

(4) Weekly Notes, 1887, p. 236.

(5) (1912) 9 A. L. J., 180.

with *lathis*, who continued to use their weapons upon him after he had fallen to the ground. The *lathi* is a lethal weapon, as has been held more than once by this Court. The circumstances of the case leave no doubt in our minds that the assailants either intended to cause death or had every reason to know that the probable result of their joint act would be death. It is pleaded that there had been no premeditation and that the attack was made suddenly, directly the assailants caught sight of the deceased. Whether there was or was not premeditation is perhaps not clear, but there was concerted action and the attack was so ferocious as to lead almost to the inference that it had been premeditated.

In any event, we cannot hold that the assailants could not have contemplated or did not contemplate that the result of their action would be death or such bodily injury as is likely to cause death.

The death was not necessarily the result of any single blow. It was the result of the many blows inflicted on the head.

In this respect we would call attention to the decision in *King-Emperor v. Subbappa Chunnappa* (1). In the present case, as in the reported case, the attack was a single indivisible thing.

The facts of the present case are very similar to those of *Emperor v. Kanhai* (2). The using of lethal weapons in the manner in which they were used in the present case leaves no room for doubting that the assailants intended to cause such bodily injury as is likely to cause death. They must, in the present case, have known that death would probably result, even if they had not fully intended to cause death, though indications of such an intention are not by any means absent. The assault was an act of revenge and carried out brutally and savagely. We have no hesitation in holding that Ram Newaz is guilty of murder. In regard to sentence, the Crown does not press for the extreme penalty. The accused is a youth who was, no doubt, led into the matter by his two elder brothers, and we agree that the ends of justice will be met by imposing the lesser of the two sentences allowed by the law. We allow the appeal and set aside the acquittal of Ram Newaz. We convict him of murder under section 302 of the Indian Penal Code and sentence him to transportation for life.

Appeal allowed.

(1) (1912) 15 Bom. L. R., 808.

(2) (1918) I. L. R., 35 All., 329.

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should have claimed rent in the previous suit, and having failed to claim it the present is barred by the provisions of the Code of Civil Procedure, 1908, order II, rule 2, which apply to Revenue Courts also (See section 193, Agra Tenancy Act). The present claim arises out of the same cause of action as the previous suit. The omission to sue for rent in the previous suit is fatal to this suit; *Mewz Kuar v. Banarsi Prasad* (1), *Lalji Mal v. Hulasi* (2), *Debi Dial Singh v. Ajaib Singh* (3), *Venkoba v. Subbanna* (4), *Maksud Ali v. Nargis Dye*, (5).

RICHARDS, C. J., and BANERJI and TUDBALL, J.J.:—This appeal arises out of a suit instituted in the Revenue Court to recover a sum of money claimed to be payable as arrears of rent under section 34 of the Agra Tenancy Act. The facts have been very clearly ascertained and are as follows. The plaintiff and the defendant or their predecessors in title were co-sharers. Disputes arose between them, which resulted in an arbitration award and a decree in accordance therewith. Under that decree the plaintiff became entitled to the property in respect of which the present claim is made, notwithstanding that the defendant had previously been in possession and occupation of this particular land. Under the arbitration award and the decree following it the defendant had to give it up to the plaintiff. He did not do so. A suit for his ejectment was then instituted in the Revenue Court. In this suit the defendant was described as a cultivator, but in the body of the plaint the actual facts were set out as stated above. The arbitration proceedings were referred to, the decree which followed on the award was mentioned, as also the fact that the defendant had insisted upon remaining in possession though many times asked by the plaintiff to give up possession. The defence was not that the defendant was a proprietor, but that he was the ex-proprietary tenant and not liable to be ejected. He based his claim to be ex-proprietary tenant on the allegation that the land in dispute had been his *sir* before the arbitration proceedings. The award had already decided that the land was not his *sir* nor his *khudkasht*, and the Revenue Court gave a decree to eject the defendant, holding that he was a non-occupancy tenant.

(1) (1895) I.L.R., 17 All., 593. (3) (1881) I.L.R., 3 All., 543.

(2) (1881) I.L.R., 3 All., 660. (4) (1887) I.L.R., 11 Mad., 150.

(5) (1892) I.L.R., 20 Cal., 323.

The present suit has now been instituted under section 34 of the Tenancy Act. The court of first instance ascertained the amount which it thought fair and equitable to be paid by the defendant under the circumstances. The lower appellate court reversed the decree of the court of first instance and dismissed the plaintiff's suit. Hence the present appeal.

Section 34 is as follows :—

“A person occupying land, without the consent of the landholder, shall be liable for the rent of that land at the rate payable in the previous year, or, if rent was not payable in the previous year, at such rate as the court may determine to be fair and equitable, but he shall not be deemed to hold the land within the meaning of section 11 until he begins to pay rent therefor.”

The appellant contends that there is no doubt that the defendant was a person occupying his land without his consent and that, therefore, he was bound to pay compensation at a fair and equitable rate which has been ascertained by the court of first instance. The respondent urges, on the other hand, that the plaintiff having sued the defendant in the Revenue Court as a tenant, cannot now recover rent from him under section 34 as a person occupying the land “without his consent.” He further contends that the plaintiff, in the previous suit to recover possession, was bound to make the claim for rent under the provisions of order II, rule 2, of the Code of Civil Procedure, and lastly, that compensation or rent under section 34 can only be recovered against the person who is still in occupation of the land at the time of the institution of the suit.

The wording of section 34 is certainly somewhat peculiar. In England there is a well known form of action, viz., the action for use and occupation. In such a case where no rent has been fixed and the land is occupied *with the permission* of the owner, an action for use and occupation lies, and where the ownership of the plaintiff is proved as well as the occupation by the defendant, *prima facie* it will be assumed that there was a contract by the defendant to pay reasonable compensation for the occupation. Section 34, however, provides that a person who occupies the land *without* *per* shall be liable to pay rent therefor. We are bound to construe the section according to the plain words used.

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July, 21.

APPELLATE CIVIL.

Before Mr. Justice Sir Pramada Charan Banerji and Mr. Justice Ryves.
HARIBANS RAI AND OTHERS (JUDGEMENT-DEBTORS) v. SRI NIWAS NAIK
(DECREE-HOLDER.)*

Civil Procedure Code (1908), order XXXIV, rule 14—Execution of decree—Usufructuary mortgage—Suit for possession of mortgaged property—Decree for possession and costs—Execution for costs by attachment of part of mortgaged property.

Certain usufructuary mortgagees suing for possession of the mortgaged property, which had not been delivered to them, obtained a decree for possession and for costs. In execution of their decree for costs the mortgagees applied for attachment of part of the mortgaged property. Held that this application was not barred by the provisions of order XXXIV, rule 14, of the Code of Civil Procedure, 1908. *Khizarajmal v. Daim* (1) distinguished. *Muhammad Abdul Rashid Khan v. Dilsukh Rai* (2) referred to.

THE facts of this case were as follows:—

The appellants and their predecessors in title executed a usufructuary mortgage in favour of one Subba Rai on the 3rd of October, 1887. The mortgage was assigned to Sri Niwas Rai Kalia and others, the respondents. Part of the property mortgaged was in the possession of prior mortgagees and the mortgagors also held mortgagee rights in other property which they included in the mortgage. In regard to those two descriptions of property, it was provided in the mortgage that the mortgagors would redeem the prior mortgage and foreclose the mortgage held by them and then deliver possession to their mortgagee, Subba Rai. The mortgagors complied with the terms of the mortgage so far that they redeemed the prior mortgage and foreclosed the mortgage held by them, but they did not deliver possession to the mortgagee. Thereupon the assignees of the mortgagee brought a suit for possession and obtained a decree, which awarded them costs. In execution of this decree for costs, they applied for attachment of the mortgaged property, that is, of the equity of redemption of the mortgagors in respect of the said property. The appellants objected to the attachment on the ground that it would contravene the provisions of order XXXIV, rule 14, of the Code of Civil Procedure, and that as the mortgagees are in possession under the

* First Appeal No. 237 of 1912 from a decree of Ali Ausat, officiating Subordinate Judge of Ghazipur, dated the 14th of June, 1912.

(1) (1904) 1 L. R., 32 Cal., 296.

(2) (1905) 1 L. R., 27 All., 517.

mortgage, they were not entitled to bring to sale the mortgagors' rights. This objection was overruled by the court below, and the mortgagors thereupon appealed to the High Court.

Mr. *Muhammad Ishaq Khan*, for the appellants.

Babu *Sital Prasad Ghosh* (with him Babu *Jogindro Nath Chaudhri*), for the respondents.

BANERJI, and RYVES JJ.:—The facts of this case are these:—The appellants and their predecessors in title executed a usufructuary mortgage in favour of one Subba Rai on the 3rd of October, 1887. The mortgage was assigned to Sri Niwas Rai Kalia and others, the respondents. Part of the property mortgaged was in the possession of prior mortgagees and the mortgagors also held mortgagee rights in other property which they included in the mortgage. In regard to these two descriptions of property, it was provided in the mortgage that the mortgagors would redeem the prior mortgage and foreclose the mortgage held by them and then deliver possession to their mortgagee, Subba Rai. The mortgagors complied with the terms of the mortgage so far that they redeemed the prior mortgages and foreclosed the mortgages held by them, but they did not deliver possession to the mortgagee. Thereupon the assignees of the mortgagee brought a suit for possession and obtained a decree, which awarded them costs. In execution of the decree for costs, they have applied for attachment of the mortgaged property, that is, of the equity of redemption of the mortgagors in respect of the said property. The appellants objected to the attachment on the ground that it would contravene the provisions of order XXXIV, rule 14, of the Code of Civil Procedure, and that as the mortgagees are in possession under the mortgage, they are not entitled to bring to sale the mortgagors' rights. This objection having been overruled by the court below, this appeal has been preferred, and the same plea has been reiterated in the appeal. In our opinion, the decision of the court below is right. Rule 14 of order XXXIV of the Code of Civil Procedure provides that "where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage." The question is whether the

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Collector held that the defendant, though a proprietor, had taken the land from the plaintiff as sub-tenant and decreed the claim. On the defendant's appeal to the District Judge the lower appellate court, without deciding the preliminary objection raised by the plaintiff that no appeal lay to that court, reversed the decree, holding that the defendant had not taken the land under a contract from the plaintiff, but that he had forcibly ejected the plaintiff several years ago and that the plaintiff's occupancy right was extinguished. The plaintiff appealed to the High Court.

The appeal first came before TUDBALL, J., who referred the case to a Bench of two Judges.

The case coming on before a Division Bench.

Babu *Piari Lal Banerji*, for the appellant :—

The learned Judge has erred in deciding the appeal before him without deciding the plaintiff's preliminary objection that no appeal lay. An appeal would lie to him, if a question of proprietary title was in issue before the court of first instance and before him. In this case, no question of proprietary title was ever in issue. The plaintiff claimed no proprietary title himself nor ever denied the defendant's proprietary title. The plaintiff alleged a specific contract of tenancy and that was the only question that arose in the case. If the tenancy was proved, the plaintiff would succeed. If the tenancy was not proved, the defendant's possession would prevail. The defendant was admittedly in possession and his allegation that he was in possession as proprietor was a mere surplusage. It practically amounted simply to a denial of the alleged tenancy and thus the only question in issue was whether the alleged contract of tenancy was proved. No appeal, therefore, lay to the District Judge. The case of *Dal Chand v. Shamla* (1) was wrongly decided and should not have been followed.

Pandit *Ladli Prasad Zutshi* (with him Pandit *Mohan Lal Nehru*), for the respondent :—

The case reported in 2 A. L. J., 176, is exactly in point and is a Division Bench ruling. The defendant, by pleading that he was in possession as proprietor, did raise a question of proprietary title which the Assistant Collector could have referred to a Civil Court for decision under the provisions of section 199 of the

(1) (1905) 2 A. L. J., 176.

Tenancy Act. If the defendant was directed to bring a suit in the Civil Court for declaration of his proprietary right, he could not have been met by the plaintiff with an allegation that there was no need for such a declaration as his proprietary right was not denied. Possession, as proprietor, was denied and that raised a question of proprietary title.

Babu *Piari Lal Banerji*, not heard in reply.

TUDBALL and FIGGOTT, JJ.:—This is a second appeal by the plaintiff, whose suit for recovery of possession was decreed by an Assistant Collector of the Gorakhpur district, but has been dismissed by the District Judge of Gorakhpur on appeal. The question is whether an appeal lay, under the circumstances, to the court of the District Judge. The plaintiff alleged that the land in suit was his occupancy holding and that he had sub-let it to the defendant, whom he now desires to eject by a suit under the provisions of the Agra Tenancy Act for that purpose. The defendant replied that he was a co-sharer in the mahal and held the land in suit as his *khud-kasht*. We cannot see that the defendant's title as proprietor was ever denied by the plaintiff. Certainly the latter never claimed to be himself the proprietor of the land in dispute or to have any right in the same, other than the right of an occupancy tenant. Under the circumstances it appears to us impossible to say that a question of proprietary title was raised by the pleadings. We have been referred in argument to the provisions of section 199 of the Tenancy Act. According to that section where, in a suit like the present, a question of proprietary title is raised by the defendant, the Revenue Court may either determine the question of title itself or require the defendant to institute a suit in the Civil Court for the determination of the same. If the Assistant Collector had begun by holding that the present was a case to which the provisions of section 199 aforesaid applied, and had required the defendant to institute a suit in the Civil Court, that suit would have been one for a declaration that the defendant was the proprietor, or one of the proprietors, of the land in suit, in the sense of being a co-sharer in the mahal to which this land appertains. Such a suit, so far as we can gather, would have been met by the present plaintiff with a plea that he never had denied, or was disposed to deny, the defendant's proprietary

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in place of the decree-holder. Notice was issued to the judgement-debtors. After several attempts to serve them personally had failed, substituted service was allowed and an order under order XXI, rule 16, was passed in favour of the assignee. The assignee then applied for execution of the decree. Thereupon the judgement-debtors raised an objection that the deed of sale being unregistered, the assignee had no title and therefore could not execute the decree. The courts below, relying on the decisions in *Abdul Majid v. Muhammad Faizullah* (1) and in *Baij Nath Lohea v. Binoyendra Nath Palit* (2) dismissed the objections. Hence the present appeal. On behalf of the appellants it is urged that the deed in question transferred to the assignee an interest in immovable property and therefore in view of section 17 (b) and section 49, clause (a), of the Registration Act, the assignee has no interest. Reliance was placed on *Gopal Narayan v. Trimbak Sadashiv* (3) and *Mutsaddi Lal v. Muhammad Hanif* (4). Of these two, the former decision was passed in 1876 and the judgement gives no reason for the decision. In regard to the latter, it is not in point at all. That case related to the transfer of the rights of the mortgagees under the mortgage-deed by means of an unregistered document. In our opinion, this appeal must fail. In the first place, the proper occasion for the appellants to take this objection was on the application of the assignee for an order under order XXI, rule 16. In the next place, in view of the decisions in I. L. R., 13 All., p. 89, I. L. R., 23 Calc., p. 450 and 6 C. W. N., p. 5, it seems to us that there is no force in this appeal. The latter case is on all fours with the case now before us. A decree not being immovable property, it has been held in the Calcutta cases noted above that the transfer of a decree does not operate to create an interest in immovable property and the deed of transfer is, therefore, not compulsorily registrable. In our opinion, the appeal must fail, and we dismiss it with costs.

Appeal dismissed.

(1) (1890) I. L. R., 13 All., 89.

(3) (1876) I. L. R., 1 Bom., 267.

(2) (1901) 6 C. W. N., 5.

(4) (1912) 10 A. L. J., 167.

Before Mr. Justice Ryves and Mr. Justice Piggott.

PEMA (DEFENDANT) v. JAS KUNWAR (PLAINTIFF).*

1913
July, 24.

Act (Local) No. III of 1901 (United Provinces Land Revenue Act), sections 107 and 111—Partition—Joint Hindu family—Hindu widow—Claim for partition by widow in possession in lieu of maintenance merely, though recorded, solatii causa, as a co-sharer.

Held that the widow of a member of a joint Hindu family who is in possession of a portion of the family property under a family arrangement, in lieu of maintenance merely, is not a co-sharer and cannot in virtue of such possession enforce a claim for partition of the share of which she is so in possession, even though her name may be recorded *solatii causa* as a co-sharer. *Kailashi Kuar v. Badri Prasad* (1), *Bhoop Singh v. Phool Kowar* (2) and *Jhunna Kuar v. Chain Sukh* (3) followed, *Blupal Singh v. Mohan Singh* (4) referred to. *Habib-ullah v. Musammam Kushiimba* (5) distinguished.

THE facts of the case were as follows:—

Mohan Singh, the ancestor of the parties, was the owner of the property in dispute. He died about thirty or thirty-five years ago. He had three sons, Prem Singh, Gaila Singh and Pema. Prem Singh died during the life-time of Mohan Singh, leaving him surviving his widow, the plaintiff; Gaila Singh died shortly after Mohan Singh's death. On the death of Mohan Singh, his property was recorded in the khewat in the names of the aforesaid Gaila, Musammam Jas Kunwar the plaintiff, and Pema the objector. On the strength of the entry of her name in the khewat, the plaintiff applied to the Revenue Court for imperfect partition of her share. Pema and the sons and representatives of Gaila, the deceased brother, objected, saying that the name of the plaintiff was entered by way of consolation, that she was allowed to realize the rents and profits of the particular share in lieu of maintenance allowance, and that she could not have the share partitioned. The Revenue Court disallowed the objections of the defendants, but held that the property in dispute was given to the plaintiff for her support. On appeal, the District Judge confirmed the decree of the Revenue Court on the ground that the plaintiff, being a recorded co-sharer,

* Second Appeal No. 164 of 1912, from a decree of L. Johnston, District Judge of Meerut, dated the 4th of October, 1912, confirming a decree of Muhammad Ghafur Khan, Assistant Collector, First Class, of Meerut, dated the 30th of July, 1912.

(1) S. A. No. 244 of 1912, decided 17th July, 1913. (3) (1881) I. L. R., 2 All., 400.

(2) (1867) N. W. P., H. C. Rep., 268. (4) (1897) I. L. R., 19 All., 224.

(5) (1908) 3 A. L. J., 491.

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Hindu Law, 7th Edition, paragraphs 395, 396 and 397. The law applicable to a Hindu widow entitling her to claim partition under the Revenue Law, would be quite applicable to a case like the present. This case approaches very nearly the case reported in I. L. R., 3 All., 400, which was a case of a Hindu widow claiming partition under the Revenue Act. The case of *Bhoop Singh v. Phool Kower* (1) relied on by the other side, is not to the point, inasmuch as the facts of the case, as set forth in the judgement, do not disclose whether the woman claiming partition in that case, was a "recorded co-sharer." Moreover the law applicable to partition there was materially different from the present law. In Act XIX of 1863, section 3, the words used were "recorded proprietor," and not "recorded co-sharer." The latter terms were brought in for the first time in Act XIX of 1873. A proprietor may be a co-sharer but all co-sharers are not proprietors. Besides, a Hindu widow who is in possession of property in lieu of maintenance, holds a charge over the property in her possession, and the charge will hold good for her life-time; Mayne's Hindu Law, 7th Edition, paragraph 460. In this aspect the present case is governed by the case of *Habibullah v. Musammat Kushimba* (2).

Babu Sarat Chander Chaudhri, in reply:—

The case of *Habibullah v. Musammat Kushimba* was one of a Muhammadan widow in possession of her husband's property in lieu of her dower. Her right was a much higher right than that of a Hindu widow in possession of property in lieu of maintenance. Moreover in Act XIX of 1863, section 3, the word 'proprietor' was used where the word 'co-sharer' now occurs, and, there being no substantial change in the law on that point, it may be taken that the word 'proprietor' was used synonymously with the word "co-sharer."

RYVES and PIGGOTT, JJ:—The facts out of which this appeal arises are as follows:—Mohan Singh was the owner of some zamindari property. He had three sons, Prem Singh, Gaila and Pama. Prem Singh died in the life-time of his father, leaving surviving him a widow, Musammat Jas Kunwar (plaintiff respondent). After the death of Mohan Singh, his property was recorded in the

(1) (1867) N.W.P., H. O. Rep., 368.

(2) (1905) 3 A. L. J., 421.

names of Gaila, Musammat Jas Kunwar and Pema. Subsequently Gaila died and the names of his widow and sons were recorded in the khewat instead of his own name. On the 13th of November, 1911, Musammat Jas Kunwar instituted a suit in the Revenue Court for imperfect partition in respect of a one-third share of the property which had originally belonged to Mohan Singh, stating in her plaint that she was "the owner, zamindar and co-sharer of one-third out of one-fourth share in the holdings bearing khewat Nos. 22, 23 and 33 in mauza Nehru," and was in possession thereof. The reason for seeking partition, she alleged, was because there were constant disputes between the parties owing to the property being joint. Pema, defendant appellant, objected under section 111 of the Revenue Act, on the ground that Musammat Jas Kunwar's name had been entered in the Revenue papers merely for her consolation, and that she was not in possession as a co-sharer, but had been receiving maintenance only, and that was all that she was entitled to.

The first court framed, among others, two issues, as to the entry of Musammat Jas Kunwar's name in the khewat and as to her possession. That court decided both these issues in the plaintiff's favour and disallowed Pema's objection. On appeal the learned District Judge found as follows :—

"It appears that Musammat Jas Kunwar has been in possession of her husband's share, and I find accordingly. As her husband predeceased her father-in-law, it appears that she was allowed her husband's share on her father-in-law's death, in lieu of maintenance and by way of consolation and she was recorded at Mohan Singh's death as a co-sharer. She is entitled then to partition of the share recorded in her name. It is clear that Musammat Jas Kunwar has not absolute ownership." He dismissed the appeal.

It has been contended before us that, on the facts found, Musammat Jas Kunwar is not entitled to partition, because she cannot be said to be a co-sharer, and the mere fact that she is recorded in the khewat as such, does not make her a co-sharer. It is argued that she has not even the limited estate of a Hindu widow in possession of her deceased husband's share. As her husband died in the life-time of her father-in-law, the utmost that she was entitled to,

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August, 1.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Piggott.

BALWANT SINGH AND ANOTHER (PLAINTIFFS) v. GAYAN SINGH AND OTHERS (DEFENDANTS).*

Mortgage—Interest—Construction of document—Mortgage by conditional sale with no provision for post diem interest—Post diem interest not allowed.

A mortgage executed in 1869 provided for the payment of the sum of Rs. 300 with interest at Rs. 1-8 per cent. per mensem in one lump sum upon a certain specified date four years from the date of the mortgage. It further provided that, if the money was not paid upon that date, the property mortgaged should become the absolute property of the mortgagee. There was no stipulation of any kind as to the payment of interest after the date fixed.

Held that the mortgagee was not entitled to *post diem* interest. *Mathura Das v. Raja Narindar Bahadur* (1) distinguished. *Gudri Koer v. Bhubaneswari Coomar Singh* (2) and *Moti Singh v. Ramohari Singh* (3) followed.

THE facts of this case were as follows:—

Dharam Singh and Sundar Singh, the predecessors in title of defendants, executed a mortgage by conditional sale in favour of Towri Singh, the ancestor of the plaintiffs, on the 9th of March, 1869. The mortgage purported to have been executed to pay off a prior mortgage of the 14th of January, 1864, in favour of one Pem Singh. The defendants pleaded payment and absence of legal necessity to make the mortgage, but both the pleas were decided against them. The Subordinate Judge decreed the suit, giving six months' time to the defendants to redeem. Interest was to be calculated up to six months from the date of decree. The District Judge, however, modified the decree only allowing interest for four years from the date of the bond.

The terms of the bond were as below:—

"In order to pay off a previous mortgage deed I have borrowed Rs. 300 from the mortgagee and hypothecated the share of which I am the owner as security. I will repay and liquidate the loan with interest at 1-8 per mensem in one lump sum within four years. If I fail to do this, after the expiration of the appointed period, the hypothecated property may be foreclosed and sold outright."

The learned Judge held that the intention of the parties was that no interest was to be paid after four years from the date of the bond. The plaintiffs appealed to the High Court.

* Second Appeal No. 174 of 1913 from a decree of E. O. Allen, District Judge of Mainpuri, dated the 14th of August, 1912, modifying a decree of Pratap Singh, Additional Subordinate Judge of Mainpuri, dated the 20th of January, 1912.

(1) (1896) I. L. R., 19 All., 39. (2) (1891) I. L. R., 19 Calc., 19.

(3) (1897) I. L. R., 24 Calc., 699.

Babu *Sital Prasad Ghose*, for the appellant:—

The relation of mortgagor and mortgagee subsists so long as the mortgage is not foreclosed, and so long as that relation subsists interest is payable. The interest is a charge upon the property. In all cases of redemption interest runs up to the date of payment and in cases of foreclosure up to the date the property is foreclosed, *Mathura Das v. Raja Narindar Bahadur* (1), *Gudri Koer v. Bhubaneswari Coomar Singh* (2). The case of *Bikramjit Tewari v. Durga Dyal Tewari* (3) is against me, but that does not lay down the correct law. In fact a subsequent case, *Moti Singh v. Ramohari Singh* (4), does not follow that case. Even though the courts are not bound to allow the stipulated rate of interest, they have inherent power to allow interest under the Interest Act. In this case such a power should be exercised. Order XXXIV, rule 2, of the Code of Civil Procedure also contemplates that interest should be allowed up to the date of redemption.

The Hon'ble Dr. *Sundar Lal* (with him The Hon'ble Mr. *Abdul Raoof*), for the respondents:—

The question is whether interest is payable on this mortgage. The question of intention is material. The intention was that the property was to be absolutely conveyed if principal and interest was not paid by the end of four years. This is no contract for payment of any interest after four years, at the end of which period the property was to become the property of the mortgagee and the debt wiped off. The contract of mortgage contemplated that the debt will be extinguished either by payment or by transfer of property in lieu thereof, at the end of the term. The payment of interest *post diem* was not contemplated. The mortgage in question is the creation of a contract and in the absence of a stipulation in the mortgage the interest *post diem* (even if it were payable by way of compensation or under the provisions of Act XXXII of 1839 (Interest Act), could not be made a charge upon the property. There is no statutory provision creating such a charge for any interest payable as compensation.

RICHARDS, C. J. and PIGGOTT, J.:—This appeal arises out of a suit for foreclosure. The mortgage is a very old one, being dated the 9th of March, 1869. The mortgage provided for the payment

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of the sum of Rs. 300 with interest at 1-8 per cent. per mensem, in one lump sum upon a certain specified date, four years from the date of the mortgage. It then provided that if the money was not paid on that date the property should be the absolute property of the mortgagee. There was no stipulation of any kind for the payment of interest after the date fixed; and the mortgage, as mentioned above, was made before the passing of the Transfer of Property Act. Numerous defences were raised in the courts below.

The court of first instance gave a decree for foreclosure ascertaining the interest at the sum of Rs. 3,178-4-7 together with the Rs. 300 for principal, and provided that if payment was not made on the 20th day of July, 1912, the defendants should be absolutely debarred from all right to redeem the mortgaged property.

The lower appellate court modified the decree of the court below to this extent that it ascertained the amount due as being Rs. 300 principal together with interest at 1-8 per cent. per mensem for four years, that is to say, Rs. 300 for principal, and Rs. 216 for interest making a total of Rs. 516. Six months were allowed for payment, during which period of six months interest at the rate of 6 per cent. per annum should run.

The plaintiffs come here in second appeal contending that the decree of the court of first instance was correct and that the interest should have been allowed at the contractual rate during the whole period up to the time fixed for payment. In the course of the argument the learned vakil on behalf of the appellants contended that, even if he was not allowed the contractual rate of interest he should be allowed some rate of interest under the provisions of the Interest Act.

The main proposition of the appellants is that in all cases of mortgage by conditional sale, interest at the contractual rate runs up to the time fixed for payment and that this is the necessary consequence of the relationship of mortgagor and mortgagee whether the payment of interest is or is not provided for by the deed. The question is by no means free from difficulty. In the case of *Gudri Koer v. Bhubaneswari Coomar Singh* (1) it was held, under

(1) (1891) I. L. R., 19 Cal., 19.

circumstances which we cannot distinguish from the present, that *post diem* interest was not recoverable. This case was referred to and approved by the majority of the Court in the Full Bench ruling of *Moti Singh v. Ramohari Singh* (1). The question of *post diem* interest came before their Lordships of the Privy Council in the case of *Mathura Das v. Raja Narindar Bahadur* (2). In that case (which was one of a simple mortgage) the High Court had refused to allow *post diem* interest. This decision was overruled by their Lordships of the Privy Council: but a perusal of the judgement shows that their Lordships based their judgement on the particular terms of the mortgage deed and in particular upon a covenant in that deed which provided that the mortgagor would not transfer the mortgaged property until the full principal and interest had been paid. The stipulations in that deed upon which their Lordships relied are entirely absent from the mortgage in the present case. Under these circumstances, we see no sufficient reason to interfere with the decision of the court below.

With regard to the point that interest should be allowed under the Interest Act, it seems extremely doubtful, having regard to the time which has elapsed since the deed was entered into, whether any interest could be reasonable under that Act, but in any event we do not think that the sum which could be awarded under that Act would be a charge on the property. In the present case, the duty of the court is to ascertain what sum is now charged on the property for principal and interest.

Under these circumstances, we think that the decision of the court below was correct, and we accordingly dismiss the appeal with costs. The time for payment is enlarged so as to run for four months from the date of this decree. Simple interest at 6 per cent. per annum will continue to run as decreed by the court below. The decree will not issue until the appellant or respondent has made good the deficiency.

Appeal dismissed.

(1897) I. L. R., 24 Calo., 699.

(2) (1896) I. L. R., 19 All., 89.

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1918
May, 19.

Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.
MAHENDRA GOPAL MUKERJI (APPLICANT) v. LACHMAN PRASAD AND
ANOTHER (OPPOSITE PARTIES).*

Company—Winding up—Shares applied for subject to a condition, and partly paid for—Condition not fulfilled—Resolution of company to refund part payment—Position of applicant as regards winding up proceedings.

A company started in Meerut in 1904, with objects of a very general nature, proposed in 1906 to erect a mill at Fyzabad, and accordingly issued a prospectus and invited the public to subscribe the necessary capital. On the faith of this prospectus one M. applied for shares, but added to his application a condition to the following effect:—"These shares are only subscribed on the condition that any mill is started in the suburbs of Fyzabad." The company, however, found that they could not raise the necessary funds to start a mill at Fyzabad, and therefore passed a resolution that the money already subscribed for that purpose should be refunded. But before this was done the company went into liquidation.

Held that M. was in the circumstances not a member of the company, but a creditor and entitled to get back what he had already paid.

THE facts of this case were as follows:—

A company was started in Meerut in 1904, which was called the Ganga General Mills Company, Limited. Its object apparently was to carry on business of any and every description. Apparently in 1906 this company considered the advisability of starting a branch mill at Fyzabad or its suburbs. It accordingly issued a prospectus and invited the public to subscribe the necessary capital. The present applicant put in an application in the ordinary form in which the following condition was entered:—"These shares are subscribed only on condition that any mill is started in the suburbs of Fyzabad." The application was entertained by the Directors and shares were allotted; but no mill was started at Fyzabad. Subsequently, on the 27th of September, 1909, a resolution was passed by the company that "as there was no prospect of starting a branch factory at Fyzabad, the conditional share-holders may be paid." After this the company failed and went into liquidation. The present appellant's name was on the register of members, and he was called upon to pay the balance due on the shares. The court of first instance held that he was a member of the company and therefore must pay the balance due from him. The applicant thereupon appealed to the High Court.

* First Appeal No. 17 of 1913, from an order of L. Johnston, District Judge of Meerut, dated the 11th of October, 1912.

Dr. *Surendra Nath Sen*, for the appellant.

Mr. *Nihal Chand* and the Hon'ble Dr. *Tej Bahadur Sapru*, for the respondents.

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TUDBALL, and MUHAMMAD RAFIQ, JJ.:—These four appeals are all connected and are governed by this judgement. The facts are very briefly as follows:—A company was started in Meerut in 1904, which was called the Ganga General Mills Company, Limited. Its object apparently was to carry on business of any and every description that can be done under the sun. Apparently in 1906 this company considered the advisability of starting a branch mill at Fyzabad or its suburbs. It accordingly issued a prospectus and invited the public to subscribe the necessary capital. The present appellant put in an application in the ordinary form in which the following condition was entered:—"These shares are subscribed only on condition that any mill is started in the suburbs of Fyzabad." The application was entertained by the Directors and shares were allotted, but no mill was started at Fyzabad. Subsequently on the 27th of September, 1909, a resolution was passed by the company that "as there was no prospect of starting a branch factory at Fyzabad, the conditional share-holders may be paid." In other words, the company, finding that it could not raise sufficient funds to carry on the business of the company at Fyzabad, made up its mind to take the only course that it could honestly take, i.e., to refund the sum it had already taken from the applicant. After this the company failed and went into liquidation. The present appellant's name was on the register of members and he was called upon to pay the balance due on the shares. The court below has held that he is a member of the company and therefore must pay the balance due from him. Hence the appeal. A preliminary objection is taken that the notice required by section 169 of the Companies Act, has not been given within the time prescribed by law, and the time has not been extended. On it being pointed out that the learned Judge of this Court before whom the appeal was presented extended the time for service of notice, it was urged that it was an *ex parte* order and the present case was not a fit one for the granting of such an extension. An affidavit was filed by the appellant to the effect that he had been misled by the legal advice given to him and hence the delay in

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making the appeal and application. We do not deem it necessary to go in detail into this question. The circumstances are peculiar, and in our opinion in such circumstances extension of time ought to be granted and has properly been granted.

In regard to the merits of the case the decision depends upon the question as to whether the condition on which the present appellant applied for shares was a condition precedent to his becoming a share-holder in the company. We have little hesitation, looking to the facts of the case and the subsequent conduct of the company itself, that it was clearly understood by the present appellant and the company that it was a condition precedent that a branch mill should be started at Fyzabad or its suburbs. If it had been otherwise, there would have been no necessity for the company to pass the resolution of the 27th of September, 1909. It appears that the company wished to raise funds locally and the persons living in Fyzabad were willing to subscribe provided that a mill was started there. The learned advocate for the respondents admits that if the condition is a condition precedent, as stated above, the appellant is entitled to succeed. In view of the facts stated above we have no hesitation in saying that the condition was a condition precedent. The appellant is not a member of the company, but apparently is a creditor and entitled to get back what he has already paid. We allow the appeal and set aside the order of the court below. His name will be removed from the list of contributories. The appellant will get his costs in both courts.

Appeal allowed.

Before Sir Henry Richards, Knight, Chief Justice, and Mr Justice Sir Pramada Charan Banerji.

1918
June, 5.

RANDHIR SINGH (PLAINTIFF) v. BHAGWAN DAS (DEFENDANT), *
Act (Local) No. III of 1901 (United Provinces Land Revenue Act), section 111—Plaintiff referred to Civil Court—Suit filed within time but subsequently withdrawn—Second suit filed after prescribed period.

Where a Revenue Court, acting under section 111 of the United Provinces Land Revenue Act, 1901, required a party to the case before it to institute a suit in the Civil Court within three months, and the plaintiff did so, but for some technical reason had to withdraw it with permission to bring a fresh suit, which was in fact filed without delay, but after the three months had expired: *held* that the second suit must be considered to be a continuation of the first suit, and it could not, therefore, be held that the plaintiff had not complied with the order of the Revenue Court.

THE facts of this case, so far as they are material for the purposes of this report, were as follows:—

The plaintiff brought a suit in the Civil Court for a declaration of his title to certain immovable property in pursuance of an order of a Revenue Court under section 111 of Act No. III of 1901. The suit was instituted within the three months allowed, but was withdrawn on account of a technical defect, with liberty to bring a fresh suit. The present suit, which has given rise to this appeal, was accordingly filed, but beyond the three months allowed by the Revenue Court. The court below decreed the suit in part. Both parties appealed, the plaintiff contending that the whole suit should have been decreed, and the defendant that the entire suit should have been dismissed.

Munshi *Gulzari Lal*, for defendant respondent, contended that the suit, not having been filed within three months, was barred by time. He relied on *Banwari Lal v. Gopi* (1). The mere fact that originally the suit was instituted within three months did not help the plaintiff, inasmuch as the present suit was not filed within three months. The permission granted by the court to file a fresh suit was subject to the time limitation for the filing of the suit.

Babu *Piari Lal Banerji* (for Babu *Durga Charan Banerji*), for the plaintiff appellant, urged that the present suit should be

* Second Appeal No. 663 of 1912 from a decree of E. H. P. Rose, Additional Judge of Gorakhpur, dated the 22nd of February, 1912, modifying a decree of Kesri Narain Chaudhary, Munsif of Basti, dated the 20th of September, 1911.

(1) (1907) 4 A. L. J., 713.

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deemed to be a suit in continuation of the first suit, which was filed within three months, and the present suit was filed on the very next day after the first suit was withdrawn.

Munshi *Gulzari Lal* was heard in reply on other points arising in the cross appeal filed by the defendants appellants.

RICHARDS, C. J. and BANERJI, J.—This and the connected appeal No. 765 of 1912 arise out of the same suit. The suit was brought by the plaintiff for a declaration of his title in respect of a three anna two pie odd share in mauza Manjaba Hardaspur. It appears that on the 10th of June, 1901, Bhagwan Das, the respondent in this appeal and the appellant in the connected appeal, and five other persons, who were defendants to the suit, sold a six anna eight pie share in the village in question to the predecessor in title of the plaintiff. At that time, however, mutation could only be obtained in respect of a three anna five pie odd share. In the year 1908, Bhagwan Das applied for partition, alleging himself to be entitled to certain shares in the village. The plaintiff contested the share claimed by Bhagwan Das. Thereupon the Revenue Court directed the plaintiff in the present suit to institute proceedings in the Civil Court, within three months, to establish his title. A suit was instituted within the prescribed period, but for some technical reason the suit had to be withdrawn with leave to bring a fresh suit. The court of first instance decreed the plaintiff's claim to the extent of a two anna six pie odd share against Bhagwan Das and his co-defendant of the first party. The defendant, Bhagwan Das, appealed to the lower appellate court. The lower appellate court has given a judgement which we feel great difficulty in understanding. In the first place, the learned Judge seems to think that he was entitled to apportion the liability of Bhagwan Das and his co-vendors. We think that this was quite incorrect. All the vendors were jointly liable to make good the property which they purported to sell out of any property which they had at the time of the sale or which they subsequently acquired. If we were to accept the finding of the learned Additional Judge that Bhagwan Das acquired an eight pie share after the date of the purchase, it might possibly be a reason for giving the plaintiff a decree to the full extent claimed. However, the plaintiff did not

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to have recourse against such portion of the family property as he had taken in exchange therefor. *Byjnath Lall v. Ramooddeen Chowdry* (1) distinguished.

THE facts of this case were as follows :—

Bhagirath and Baldeo, two brothers, formed a joint Hindu family, and owned, amongst other zamindari property, a ten biswa share in mauza Chauwar. They jointly executed a mortgage in favour of the plaintiff's father, on the 8th of November, 1879, of this ten biswa share in Chauwar. On the 16th of November, 1881, the two brothers executed two separate mortgages, in favour of the same mortgagee, in each of which each brother hypothecated a five biswa share in Chauwar for half the amount then due under the original mortgage deed of 1879. These two mortgage bonds were signed by both brothers. On the 16th of October, 1888, the joint family property was partitioned privately and the whole ten biswa share in Chauwar was allotted to Baldeo's share, and it became his separate property. Baldeo's mortgage was subsequently discharged, under circumstances related later on. The plaintiff, who was the son of the original mortgagee, sued to recover Rs. 4,326-4-0 on foot of the mortgage executed by Bhagirath on the 16th of November, 1881, and prayed that, in default of payment, the mortgaged property, namely, a five biswa share of Chauwar, be put up for sale, or if the court considered that on account of the partition of the 16th of October, 1888, the plaintiff was not entitled to have the mortgaged property in Chauwar sold, then the other property allotted to Bhagirath in lieu of his share in Chauwar might be sold by auction. The representatives of the original mortgagors, who, however, had no longer any interest in the property, and their various transferees were made defendants. Both the lower courts decreed the suit, and directed that in default of payment of the mortgage money, a five biswa share in Chauwar be sold. The present appeal was preferred by some of the defendants to the suit, who were in possession of the property both as purchasers of a portion thereof and as mortgagees under a possessory mortgage of the whole ten biswas executed by Baldeo after the partition of the family property.

Mr. M. L. Agarwala, Dr. Satish Chandra Banerji and Munshi Gobind Prasad, for the appellants.

Mr. B. E. O'Connor, The Hon'ble Dr. *Sundar Lal*, The Hon'ble Dr. *Tej Bahadur Sapru* and Babu *Lalit Mohan Banerji*, for the respondents.

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RYVES, J.—This appeal arises out of the following facts:—Bhagirath and Baldeo, two brothers, formed a joint Hindu family, and owned, amongst other zamindari property, a ten biswa share in mauza Chauwar. They jointly executed a mortgage in favour of the plaintiff's father, on the 8th of November, 1879, of this ten biswa share in Chauwar.

On the 16th of November, 1881, the two brothers executed two separate mortgages, in favour of the same mortgagee, in each of which each brother hypothecated a five biswa share in Chauwar for half the amount then due under the original mortgage deed of 1879. These two mortgage bonds were signed by both brothers.

On the 16th of October, 1888, the joint family property was partitioned privately and the whole ten biswa share in Chauwar was allotted to Baldeo's share and it became his separate property. Baldeo's mortgage was subsequently discharged, under circumstances related later on.

The plaintiff, who is the son of the original mortgagee, has now sued to recover Rs. 4,326-4-0 on foot of the mortgage executed by Bhagirath on the 16th of November, 1881, and prayed that, in default of payment, the mortgaged property, namely, a five biswa share of Chauwar be put for sale, or if the court considered that on account of the partition of the 16th of October, 1888, the plaintiff was not entitled to have the mortgaged property in Chauwar sold, then the other property allotted to Bhagirath in lieu of his share in Chauwar might be sold by auction. The representatives of the original mortgagors, who, however, have no longer any interest in the property, and their various transferees were made defendants.

Both the lower courts decreed the suit, and directed that in default of payment of the mortgage money, a five biswa share in Chauwar be sold. The present appellants are in possession of this property. They acquired their title under the following circumstances:—

On the 11th of November, 1892, they took a possessory mortgage from Baldeo of his ten biswa share in Chauwar of which he

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when they bought the four biswa share in 1893, they do not even allege that they believed it was unincumbered. If they had taken the trouble to examine the registration records, which, as prudent men they should have done, they would have discovered that the mortgage of Bhagirath executed in 1881 was still outstanding. I would dismiss the appeal with costs.

PIGGOTT, J.—I concur generally. The rule laid down in *Byjnath's* case obviously can have no application to transactions entered into with the general body of co-parceners. In the present case I look on the transaction of the 16th of November, 1881, as little more than a novation of the older contract of 1879, and seeing that each of the brothers signed the other's mortgage deed as a witness, it is obvious that the mortgagee was dealing with the two of them and had the consent of both to the transaction then entered into. Under the circumstances, the rights of the mortgagee and the liability of the mortgaged property could not, in my opinion, be affected by the subsequent partition.

BY THE COURT :—The appeal is dismissed with costs.

Appeal dismissed.

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July, 17.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Sir
Pramada Charan Banerji.

KAILASHI KUNWAR (DEFENDANT) v. BADRI PRASAD (PLAINTIFF).
Act (Local) No. III of 1901 (United Provinces Land Revenue Act), sections 107, 111 and 112—Partition—Joint Hindu family—Hindu widow—Claim for partition by widow in possession in lieu of maintenance merely, though recorded, solatii causâ, as a co-sharer.

Held that the widow of a member of a joint Hindu family who is in possession of a portion of the family property under a family arrangement, in lieu of maintenance merely, is not a co-sharer and cannot in virtue of such possession enforce a claim for partition of the share of which she is so in possession, even though her name may be recorded, *solatii causâ*, as a co-sharer. *Bhoop Singh v. Phool Kower* (1) and *Jhunna Kuar v. Chain Sukh* (2) referred to.

The facts of this case are fully set forth in the judgement. Briefly stated, they were these :—The appellant was a Hindu widow in a joint family and had a right to maintenance. Under

* Second Appeal No. 344 of 1913 from a decree of Austin Kendall, District Judge of Cawnpore, dated the 5th of December, 1912, reversing a decree of Dina Nath Tandan, Assistant Collector, First Class, of Cawnpore, dated the 8th of May, 1912.

(1) (1867) N.-W. P., H. C. Rep., p. 868. (2) (1881) I.L.R., 8 All., 400.

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1905. The reversioners brought a suit for recovery of the property, alleging that it had been acquired out of the savings of the income of Than Chand's estate and that it formed part of the corpus of that estate. The Subordinate Judge decreed the claim. The defendants appealed.

Dr. *Satish Chandra Banerji* (with him Mr. *Ibn Ahmad*), for the appellant:—

The lower court is wrong in presuming that the property was acquired out of the income of the husband's estate and that it formed part of that estate. There is no presumption of law that property acquired by a Hindu widow forms part of her husband's estate. The question from what source the purchase money came is one of fact; and it was for the plaintiffs to start their case with evidence sufficient to shift the onus of proof; *Dakhina Kali Debi v. Jagadishwar Bhattacharjee* (1); *Diwan Ran Bijai Bahadur Singh v. Indarpal Singh* (2). The plaintiffs advanced no evidence to prove that the purchase money came out of the savings of the income of Than Chand's estate. On the other hand, the appellant gave evidence to show that the money was advanced by Chhidammi Lal. Secondly, assuming that the property was purchased with the savings of the income, it is abundantly clear that the widow never intended that this property should form part of her husband's estate. She appropriated the property to herself, dealt with it by mortgaging it, and finally disposed of it by gift. Under such circumstances the property must be deemed to be her *stridhan*, and she was fully competent to dispose of it; Trevelyan: Hindu Law, page 458. The question is one of intention to be judged by the widow's conduct and mode of dealing with the property; *Bhagabati Koer v. Sahodra Koer* (3).

Pandit *Ramakant Malaviya*, (for The Hon'ble Munshi *Gokul Prasad*; with him Babu *Girdhari Lal Agarwala*), for the respondents:—

The leading case on the subject is that of *Isri Dutt Koer v. Hansbutti Koerain* (4). The circumstances of the present case are very similar to those of that case. Here, too, the widow has made a gift and other transfers to her relatives, not only of the property

(1) (1897) 2 O. W. N., 197.

(3) (1911) 16 O. W. N., 834.

(2) (1899) I. L. R., 26 Calo., 871.

(4) (1883) I. L. R., 10 Calo., 324.

in dispute, but also of other property which formed part of her husband's estate. She was attempting to change the succession, irrespective of whether the property was acquired by her or formed part of the original estate, and to give the inheritance to her own relatives. She was dealing alike with the property in dispute and property forming part of the original estate. Under such circumstances little value is to be attached to the fact of her alienation of the property in dispute as furnishing evidence of her intention to keep this property separate and apart from the *corpus* of her husband's estate. So, in the absence of satisfactory proof of such intention, the general rule must hold, namely, that property acquired with the accumulations of the income of her husband's estate would not constitute her *stridhan* but would form part of the *corpus* of that estate; Guru Das Banerji: *Hindu Law of Marriage and Stridhan*, second edition, page 309; Mayne: *Hindu Law*, seventh edition, page 846.

Dr. Satish Chandra Banerji was not heard in reply.

RICHARDS, C. J., and TUDBALL, J.—This appeal arises out of a suit for possession of immovable property. In the present appeal we are only concerned with a five biswa share in mauza Khiwali Abdullahganj. The claim is made by reversioners, who claimed that the shares in this village formed portion of the estate of Than Chand. Than Chand died very many years ago, leaving him surviving two widows, Musammat Dhan Kunwar and Musammat Lachman Kunwar. Musammat Lachman Kunwar survived Musammat Dhan Kunwar. Musammat Lachman Kunwar died on the 18th of March, 1905, and the present suit was instituted on the 6th of August, 1908.

The title to the property now in dispute is shortly as follows:—It originally belonged to a man called Dullī; and here we may mention that it is not contended that Than Chand ever owned this property or indeed any share in this village. One Sheikh Muhammad Sharf-ud-din had a decree against Dullī, and the property was put up for sale in execution of this decree. It was purchased by one Baldeo, otherwise Badlu, a Brahman. He was not the actual purchaser, but he acquired the rights of the purchaser through pre-emption. Baldeo, otherwise Badlu, having thus become possessed of the property, sold it to Musammat Lachman Kunwar in the

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year 1874, many years after her husband's death. Musammat Lachman Kunwar mortgaged the property; the exact date is not shown. She then on the 27th of November, 1888, made a deed of gift in favour of Chhidammi Lal, her brother, who entered into possession. After the death of Chhidammi Lal, his sons, Sham Lal, Hoti Ram and others, sold three biswas out of the five biswas to the appellant. A suit was then brought upon foot of the mortgage which Musammat Lachman Kunwar had made, but the appellant redeemed the mortgage before allowing the property to be put up to sale. He then brought a suit claiming to have the remaining portion of the property sold, basing his claim on the fact that he had redeemed the property and paid the whole of the mortgage debt. The remaining portion of the property was sold and purchased by the appellant. The title of the appellant to the property is thus abundantly clear, unless it can be shown that the purchase by Musammat Lachman Kunwar in 1874 was a purchase made for the benefit of her husband's estate, and that she intended that the property should form portion of his estate. Some evidence was given on behalf of the appellant to show that the purchase money which Musammat Lachman Kunwar gave for the property was actually lent to her by Chhidammi. No evidence was given by the other side to show where the money came from. The learned Subordinate Judge disbelieved the evidence that Chhidammi Lal had advanced the purchase money, and he says at page 17 of the judgement:—"Musammat Lachman was then in possession of her husband's property and therefore the presumption is that she acquired this property with the income arising out of her husband's estate. It is laid down in Siromoni's *Hindu Law*, page 372, 2nd edition:—"Where a widow is in possession of her husband's estate the burden of proving any property to be her own separate property rests on the party calling it as such." According to that principle it was for the defendants to prove that the share in question was Lachman's separate property and her *stridhan*, but I think that he has failed to do so. I do not believe Dulli and Bhupal's statements that Lachhman took the money for this purchase from Chhidammi. I find that Lachman purchased this property out of the income of her husband's property and that she had only a life interest in it and that she had no right

whatever to alienate it. The alienations made by her and her transferee's heirs are not binding on the plaintiffs." Even if we assume that the property was purchased out of the savings of the income of Than Chand's estate, the widow was entitled to deal with those savings as she thought fit. Now if it could be shown that at the time of the purchase it was her intention that the property should become an accretion to her husband's estate, she might not afterwards perhaps have been able to take it away from the husband's estate and change the devolution of the title thereto. In the present case, however, we find that not very long after the acquisition of the property she mortgaged it, thus dealing with it as her own property. We have already mentioned that her husband had never owned the property or any shares in this village. Subsequently, in the year 1888, she made a deed of gift. We do not think, under these circumstances, that we ought to hold that it was the intention of Musammatt Lachman Kunwar to buy this property as an accretion to her husband's estate. It seems to us that the matter is well put in Mr. Trevelyan's work on Hindu Law at page 458 :—"Should she invest the income in such a way as to indicate her intention that it was not to form part of her husband's estate, but to remain at her disposal, whether such investment be of a temporary or permanent nature, she can deal with it, at any rate, during her life-time. Should she not dispose of property during her life-time, it does not pass to her heir, but is treated as a portion of her husband's estate." Under these circumstances, we think that the appeal ought to be allowed.

We accordingly allow the appeal, set aside the decree of the court below and, as against the present appellant, dismiss the plaintiff's claim with costs in all courts.

Appeal allowed.

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July, 29.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Piggott;
MAKHAN DAS (DEFENDANT) v. MANNU LAL AND ANOTHER (PLAINTIFFS)
AND KALLU DAS (DEFENDANT).*

Civil Procedure Code (1908), order V, rule 15—Summons—Question of sufficiency of service of summons.

The summons in a suit was served on the paternal uncle of the defendant, who was a member of the same joint family and lived in the same house with the defendant.

Held that such service was insufficient in the absence of evidence that the defendant himself could not be found.

THE facts of the case were as follows :—

A suit was instituted against Kalka and his nephew, Makhan. The summons was served on Kalka personally. The summons issued to Makhan was also handed over to Kalka, who wrote on the back of the summons, "Signature of Makhan by the pen of Kalka." Neither of the defendants appeared to defend the suit, and it was decreed *ex parte*. Thereafter Makhan applied to have the *ex parte* decree set aside. He stated that the summons had not been served on him; that he had no knowledge of the suit and that his uncle Kalka was a man not in his senses. It appeared that Kalka and Makhan were members of a joint Hindu family. It did not appear that Kalka had ever been authorized by Makhan to accept service of summons for him. It was neither proved nor alleged that at the time when the summons was handed over to Kalka Makhan could not be found, or that any attempt was made to find him and serve the summons on him personally. The lower court, in disposing of Makhan's application, held that he had failed to prove that Kalka was not in his senses, or that he had not been informed of the institution of the suit, and dismissed his application. The defendant appealed to the High Court.

Mr. *Muhammad Ishag Khan*, for the appellant :—

Under order IX, rule 13, it was sufficient for the applicant to show that the summons was not duly served. He need not prove anything more. Admittedly, the summons was not served on him personally; the question is whether under the circumstances of the case the service was proper and sufficient. It is submitted that it was not, for the conditions laid down for service in the mode

* First Appeal No. 100 of 1913 from an order of Murari Lal, Subordinate Judge of Cawnpore, dated the 19th of April, 1913.

prescribed by order V, rule 15, were not proved to have existed. Substituted service had not been ordered or applied for.

Pandit *Vishnu Ram Mehta* (with him The Hon'ble Dr. *Sundar Lal*), for the respondents :—

Makhan and Kalka were members of the same family and lived jointly. The presumption arises that Makhan must have had actual notice of the institution of the suit from his uncle who accepted service of the summons for Makhan. Under the circumstances it was for Makhan to show that he had, as a matter of fact, no knowledge of the suit. Service on the head of a joint family is *prima facie* sufficient.

Mr. *Muhammad Ishaq Khan* was not heard in reply.

RICHARDS, C. J., and PIGGOTT, J.—This appeal arises out of an order of the court below refusing to set aside an *ex parte* decree. The applicant in the court below swore that he had never been served with the summons. There was no affidavit contradicting this statement. The learned Judge says “the summons was delivered to the own paternal uncle of the applicant. Now the applicant pleads that the paternal uncle is not in his senses, but he gives no proof of it, nor does he give any proof to show that he was not informed of the institution of the suit.” The service of the summons in suits is a very important part of the procedure. The Code itself provides that as far as possible service must be personal. Order V, rule 15, provides that “where in any suit the defendant cannot be found and has no agent empowered to accept service of the summons on his behalf, service may be made on any adult male member of the family of the defendant who is residing with him.” If it had been shown to the complete satisfaction of the court that the present appellant could not be found and that service for that reason had been made upon his paternal uncle, who lived with him, the court would have been entitled to have held the service sufficient. But there appears no evidence whatever that there was any difficulty in finding the appellant. It appears to have been considered that it was quite sufficient to hand the summons to his paternal uncle. This view of the law is not correct. We must allow the appeal, set aside the order of the court below, grant the application to set aside the decree and

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remand the case with directions to re-admit the case upon its file of pending cases and proceed to dispose of it according to law.

Appeal decreed and cause remanded.

1913
July, 31.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Piggott.
BALGOBIND AND ANOTHER (PLAINTIFFS) v. BHAGGU MAL (DEFENDANT).^{*}
Act No. I of 1872 (Indian Evidence Act), section 92, proviso 1—Evidence—Proof of failure of consideration—Promissory note given partly on account of a gambling debt.

The defendant, who had been gambling with the plaintiffs and had lost, gave the plaintiffs two promissory notes, partly for his gambling losses and partly on other accounts, but it could not be ascertained what proportion of the total sum secured was represented by the gambling debts.

Held, on suit to recover on these notes, that it was open to the defendants to prove that the consideration was in part at least money lost in gambling; and that the court below was justified, on its finding that the part of the consideration represented by gambling debts could not be separated from the rest, in dismissing the whole suit. *Juggernaut Sew Bux v. Ram Dyal* (1) distinguished.

THE facts of this case were as follows:—

The defendant had been gambling with the plaintiffs at their house during the *Diwali* and had lost. Partly on account of these losses the defendant executed two promissory notes in the plaintiffs' favour. When, however, the plaintiffs sued on these notes the defendant pleaded want of consideration, also that the consideration was void, because it represented gambling losses. The court of first instance decreed the plaintiffs' claim; but on appeal the lower appellate court, after referring an issue, dismissed the suit *in toto*. The plaintiffs thereupon appealed to the High Court.

Dr. *Satish Chandra Banerji* and Dr. *Surendra Nath Sen*, for the appellants,

The Hon'ble Dr. *Tej Bahadur Sapru*, for the respondent.

RICHARDS, C. J. and PIGGOTT, J.—This appeal arises out of a suit on foot of two promissory notes. The defendant pleaded want of consideration, and also that the consideration was void because it represented gambling losses. The court of first instance decreed the plaintiffs' suit. The lower appellate court, after referring an

^{*} Second Appeal No. 141 of 1913, from a decree of J. Johnston, District Judge of Meerut, dated the 30th of September, 1912, reversing a decree of Sumair Chand, First Additional Munsif of Meerut, dated the 15th of April, 1912.

1913
August, 5.

APPELLATE CRIMINAL.

Before Mr. Justice Sir Pramada Charan Banerji and Mr. Justice Ryves.

EMPEROR v. HANUMAN AND OTHERS. *

Act No. XLV of 1860 (Indian Penal Code), sections 37, 302, 304 -- Murder—Culpable homicide not amounting to murder—Fatal assault with lathis by several persons acting in concert.

Five men—members of the same family—assaulted an unarmed man and beat him with their *lathis*. They knocked him down and continued beating him, with the result that he died then and there. Another man, who came to the rescue of the first, was also knocked down and beaten by the same five men with a similar result.

Hold that all five men were in each case guilty of the offence of murder. *Dhian Singh v. King-Emperor* (1) dissented from.

THIS was an appeal from jail by three persons out of four who had been convicted by the Sessions Judge of Mirzapur of the offence of culpable homicide not amounting to murder, under section 304 of the Indian Penal Code and sentenced to seven years' rigorous imprisonment. On this appeal coming up for hearing before a single Judge, notice had been served on all four men to show cause why they should not be convicted of murder under section 302 of the Indian Penal Code and sentenced accordingly.

The facts of the case are fully set forth in the judgement of the Court.

The Government pleader (Babu *Lalit Mohan Banerji*), for the Crown.

The appellants were not represented.

BANERJI and RYVES, JJ.—In this case four persons, Hanuman, Tippal, Sheoraj and Shankar, were convicted by the learned Sessions Judge of Mirzapur, under section 304 of the Indian Penal Code, and sentenced to transportation for seven years on two counts; the sentences were to run concurrently. All of them, except Shankar, appealed from their convictions and sentences to this Court. The learned Judge before whom the appeal came for hearing directed that notice should issue to all four of them to show cause why their conviction should not be altered to one under section 302 of the Indian Penal Code, and why they should not be sentenced to

* Criminal Appeal No. 482 of 1913, from an order of I. B. Mundle, Sessions Judge of Mirzapur, dated the 24th of May, 1913.

(1) (1912) 9 A. L. J., 180.

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death or to transportation for life. Notice has been served on all four. The facts of the case are very simple. Tippal and Sheoraj are the sons of Bori, who has absconded, and Shankar and Hanuman are their first cousins. Early in August, 1912, there was a dispute between Bori on the one hand and Sheoratan and Madhwa, the deceased, on the other, about some mangoes, and, as was natural, a good deal of abuse was exchanged. On the evening of the 17th of August last, Sheoratan was returning to his home shortly before sunset. As he passed Bori's house, Sheoraj caught hold of him round the waist. Sheoratan struggled to get free and abused Sheoraj. Thereupon Bori called out to the four accused to beat Sheoratan. Bori, Tippal, Hanuman and Shankar came out of the inclosure in which all five lived, with *lathis*, and all of them beat Sheoratan, who was unarmed. They felled him to the ground and went on beating him as he lay there. Madhwa, cousin of Sheoratan, came running up with a *lathi* to help him. He struck Shankar a blow on the head, but was knocked down and beaten by all five. Gauri, the father of Sheoratan, then came up and was also knocked down and beaten and left unconscious. Musammat Maiki, the wife of Madhwa, threw herself on her husband's body and was also beaten, although not severely. Sheoratan and Madhwa died on the spot. The assailants then ran away. This version of the story is that generally given by the prosecution witnesses, and particularly by Puni, who is the brother of Bori, and, therefore, the uncle of all the four appellants. Nothing has been shown, in his cross-examination or otherwise, to indicate any bias or hostility against any one of the accused, and we agree with the assessors and the learned Judge in accepting his evidence as substantially true. It amounts to this. Five men armed with *lathis* assaulted Sheoratan, a young man of some thirty-three years of age, who was unarmed, and beat him with their *lathis*. They knocked him down and continued beating him, with the result that he died then and there. The medical evidence shows that his breast-bone was fractured and that injury was also caused to the pericardium, the result of *lathi* blows. The body was so decomposed when the *post mortem* examination was made that external marks of bruises could not be detected. While the accused were thus assaulting Sheoratan, Madhwa came up to the rescue of

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his cousin. He also was beaten to the ground and so severely belaboured that he died. The medical evidence shows that his skull was fractured, and so was his breast-bone, and that death was due to the fracture of the skull. It is thus clear that all the accused brought about the death of Sheoratan and Madhwa. The learned Sessions Judge on these facts has convicted them under section 304 of the Indian Penal Code. He says:—"Though the four accused can be imputed with knowledge of the likelihood that death might be caused, yet I think no intent can be presumed. Another reason why I think the charge of murder cannot be sustained is that it is not proved which of the five men, Shankar Hanuman, Tippal, Sheoraj and Bori dealt the fatal blows that resulted in actual death."

We are unable to agree with either proposition of law. Under section 299 of the Indian Penal Code, a person is guilty of culpable homicide who causes death by doing an act with the intention of causing death or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death. Under section 300, except in the cases thereafter excepted, culpable homicide is murder if the act by which the death is caused is done with the intention of causing death, or (4thly), if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

It seems to us that the case falls clearly within the 4th clause of section 300 of the Indian Penal Code. It cannot be said that any of the exceptions takes the case out of the section. The only exception which could possibly be suggested is exception No. 4, but here, even if there was no premeditation, which may be granted, there was no sudden fight, as Sheoratan was unarmed and taken by surprise. But even if we take it that in the case of Madhwa there was a sudden fight, the accused cannot take the benefit of the exception, because they took an undue advantage of their victim and acted in a cruel manner. Sheoratan was unarmed, Madhwa, although armed, was one against five. Both were instantly felled to the ground, and in this defenceless condition were beaten with

such violence that they died on the spot. It is impossible to prove by direct evidence the intention of a particular individual. The intention can only be inferred from the reasonable and probable result of his act or conduct. The learned Judge seems to confuse the meaning of the term intention with desire. It is quite possible that these persons had no wish either collectively or individually to kill Sheoratan (as is indicated by the fact that no wound was discovered on his head), but nevertheless, if they beat him in the way it is proved that they did, they must be taken to have had knowledge that their act must in all probability cause death or such bodily injury as was likely to cause death, and if so, they are guilty of murder. Under circumstances such as these, it is quite immaterial to ascertain whose blow was the immediately fatal one. In the case of Sheoratan no single blow need necessarily have been the actual cause of death, which may have been due to the shock resulting from the many severe blows he received. They were all taking part in the beating, and all must be presumed to have known that the probable result of such a beating was that at least, such bodily injury would be caused as was likely to cause death. It did in fact cause the death of two persons in the prime of life. We cannot agree with the rule of law laid down in *Dhian Singh v. King-Emperor* (1). We, therefore, convict the four accused under section 302 of the Indian Penal Code. We set aside their conviction under section 304 of the Indian Penal Code and we sentence them under both charges with respect to the death of Sheoratan and Madhwa to transportation for life (to run concurrently) with effect from the 24th of May, 1913.

Appeal dismissed.

(1) (1912) 9 A. L. J., 180.

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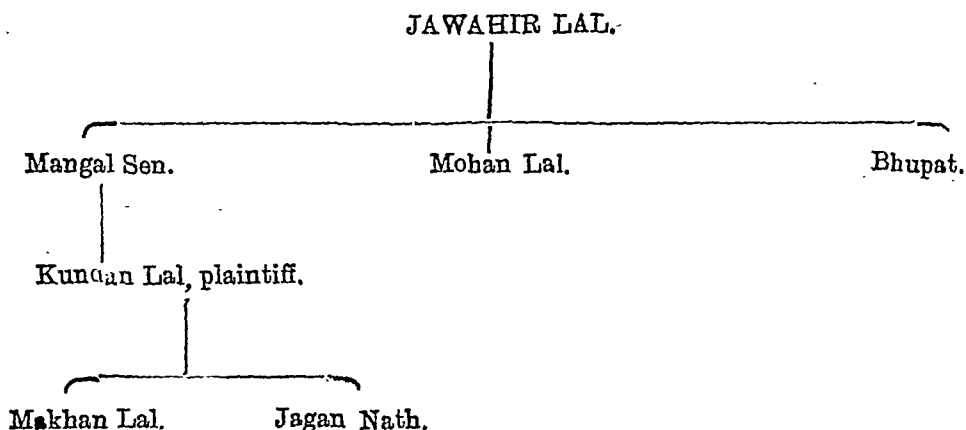
APPELLATE CIVIL.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Piggott.
KUNDAN LAL (PLAINTIFF) v. SHANKAR LAL AND ANOTHER (DEFENDANTS).
Hindu law—Joint Hindu family—Presumptions as to property in the possession of members of a joint family.

Property in the possession of a joint Hindu family should be presumed to be joint family property until the contrary is shown, even though it may have been acquired in the name of a particular member of the family.

The fact that property stands in the individual name of one or other member of a joint Hindu family does not of itself give rise to the presumption that it is the separate property of that member. *Gurumurthi Reddi v. Gurammal* (1), *Shiu Golam Sing v. Baran Sing* (2) and *Taruck Chunder Totadar v. Joodheshteer Chunder Kundoo* (3) referred to. *Ram Kishan Das v. Tunda Mal* (4) discussed.

THE following genealogical tree will help to explain the facts of this case :—



One Shankar Lal obtained a decree against Makhan Lal, a son of the plaintiff, and in execution of the decree had Makhan Lal's share in three houses attached. Kundan Lal objected to the attachment under order XXI, rule 58, of the Code of Civil Procedure; his objection was summarily disallowed, and he brought the present suit under order XXI, rule 63, for a declaration that the houses, being the self-acquired property of Kundan Lal, could not be attached and sold in execution of the personal decree passed against Makhan Lal. The court of first instance dismissed the claim, holding that

* Second Appeal No. 1322 of 1912 from a decree of H. M. Smith, District Judge of Agra, dated the 7th of September, 1912, confirming a decree of Raja Ram, Munsif of Agra, dated the 10th of June, 1912.

(1) (1908) I. L. R., 32 Mad., 88.

(3) (1873) 19 W. R., O. R., 178.

(2) (1868) 1 B. L. R., A. C., 164.

(4) (1911) I. L. R., 33 All., 677.

the houses being the joint family property were liable to attachment and sale to the extent of the share of Makhan Lal, viz., one-third. Kundan Lal appealed to the District Judge, who confirmed the decree; but his findings material to the case were as follows :—

1. Jawahir Lal left three sons, namely, Mangal Sen, the father of the plaintiff, Mohan Lal, and Bhupat, and he left no ancestral property in fact.

2. Mohan Lal purchased the first house in 1839 in his own name and the second in 1860, and Kundan Lal the plaintiff purchased the third in 1890. Bhupat and Mohan Lal had both died childless, and the plaintiff succeeded to them.

4. The family of the three brothers was joint, and after the death of Bhupat the house passed by survivorship to the plaintiff. The plaintiff appealed.

Pandit *Mohan Lal Sandal*, for the appellant :—

As the houses devolved from his uncle to the plaintiff, the houses were his self-acquired property. Reliance was placed on *Gurumurthi Reddi v. Gurammal* (1) and *Garur Prasad v. Ram Partap* (2). He submitted that only property inherited directly from the father or grandfather was ancestral property in which the sons had a vested interest by birth; *Mitakshara*, chap. 1, sec. 11, pla. 3, 27 and 33, sec. 5, pla. 3; *Kanhya Lal v. Lal Bahadur* (3); *Mayne's Hindu Law*, § 275. As there was no ancestral property, and as there is no evidence that the houses were purchased from joint family funds or with joint labour, the houses were the self-acquired property of Kundan Lal; *Shiu Golam Sing v. Baran Sing* (4); *Radhika Prasad v. Mt. Dharma Das* (5); *Babu Nand Coomar Lal v. Moulvie Razeeooddeen Hossen* (6); *Chatturbhooj Meghji v. Dharamsi Naranji* (7); *Ram Kishan Das v. Tunda Mal* (8). When a property is purchased in the name of a person the presumption is that it is his self-acquired property, and the onus is on the party asserting the contrary; *Radha Rumon Koondoo v. Phool Koomaree Bibee* (9); *Khelut Chunder Ghose v. Koong Lall Dhur* (10). The property may be joint without being

(1) (1908) I. L. R., 32 Mad., 88.

(2) (1907) I. L. R., 29 All., 667.

(3) Weekly Notes, 1902, p. 20.

(4) (1868) 1 B. L. R., A. O., 164.

(5) (1869) 3 B. L. R., 124.

(6) (1872) 10 B. L. R., 183.

(7) (1884) I. L. R., 9 Bom., 438 (445).

(8) (1911) I. L. R., 33 All., 677.

(9) (1868) 10 W. R., C. R., 28.

(10) (1868) 10 W. R., C. R., 888.

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Taruck Chunder Totadar v. Joodheshteer Chunder Kundoo (1). However this may be, the case of *Ram Kishan Das v. Tunda Mal* (2) is an authority that where it is not proved that there was any nucleus of ancestral property, there is no presumption that property acquired in the name of any individual member, or in his possession, is joint family property, and some dissent is passed against the view taken by Sir RICHARD COUCH in the case already mentioned. It seems to me, however, that it is unnecessary in the present case to express any view on the correctness of the decision of *Ram Kishan Das v. Tunda Mal*, because I think that in the present case it is necessary for the plaintiff to establish the proposition that where property has been acquired in the name of a member of a joint and undivided Hindu family, there is not only no presumption that the property is joint, but that there is actually a presumption the other way, viz., that the property is separate. This, I think, would be a very great expansion of the decision of *Ram Kishan Das v. Tunda Mal*. It seems to me that the plaintiff coming into court and seeking a declaration that property which was acquired at the time the family was joint, it lay upon him to show that the property was the separate property of the individual member of the family in whose name it was acquired. It may be urged that the mere fact that the property was acquired in his name raises some presumption that it was his separate property. It seems to me that such a contention has no force. It is well known that property which is undoubtedly joint is acquired in the name of individual members of the family. A joint family frequently consists of a large number of members, many of whom may be infants of tender years or absent. In many cases it would be practically impossible to acquire the property in the names of all the family. It is common knowledge that joint property is seldom acquired in the names of all the members and not always in the name of the manager. This being so, and the normal and natural condition of the family being one of complete unity of interest, I cannot hold that any presumption arises from the mere fact that the property has been acquired in the name or names of one or more members of the joint family. If this view be correct, the plaintiff ought to have proved that the property was acquired

(1) (1871) 13 W. R. C. S. 178. (2) (1911) I. L. R. 39 All. 677.

with the separate property of Mohan Lal, or at least that after its acquisition he held it as separate property excluding the other members. I may mention here that it was assumed in the arguments that if the houses acquired in the name of Mohan Lal were joint, the property in the other house was joint also.

For these reasons I would confirm the decision of the court below and dismiss the appeal.

PESOTT, J.—I should like to add a few words. There are three houses in dispute, one purchased in the name of Kundan Lal in the year 1890 and two purchased in the name of Mohan Lal in the years 1882 and 1889. With regard to the first of these houses there is a plea in the memorandum of appeal that, inasmuch as this house was purchased by a father during the minority of his sons, they cannot possibly have any share therein. It seems to me worth pointing out that no attempt has been made to support by argument the proposition of law here suggested. There seems on the contrary a clear presumption, unless and until the contrary is proved, that the property purchased by Kundan Lal during the minority of his sons was purchased by him out of funds which formed the joint family property of himself and of his sons.

As regards the two houses acquired in the name of Mohan Lal I wish to say only this much, that I might have found some authority in the authorities to the present case from that reported in 1 A. J. 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

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in order to entitle him to succeed in this suit. I concur in the proposed order.

BY THE COURT.—The order of the Court is that the appeal is dismissed with costs.

Appeal dismissed.

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APPELLATE CRIMINAL.

Before Mr. Justice Sir George Knox and Mr. Justice Ryves.

EMPEROR v. MAN SINGH AND OTHERS.*

Criminal Procedure Code, section 284—Assessors—Trial with only one duly appointed assessor—Trial illegal.

Of two assessors assisting the Sessions Judge in the trial of a sessions case, one only had been duly summoned to act as an assessor in that case. The other was a gentleman of some position who had formerly been on the list of assessors but had been exempted on the recommendation of the District Magistrate. *Held* that in these circumstances there was no lawful trial before a lawfully constituted tribunal, and that a new trial must be ordered. *Queen-Empress v. Badri* (1) followed.

THIS was an appeal against a conviction and sentence had and passed at a sessions trial. At the hearing a preliminary objection was taken that the tribunal by which the appellant had been tried was not lawfully constituted, inasmuch as there was only one properly appointed assessor. The other assessor was in fact a gentleman who was at one time on the list of assessors, but whose name had been removed therefrom on the recommendation of the District Magistrate upon the ground that he was a large zamindar and his position in life and status were much better than those of persons of the class from which assessors were ordinarily selected.

Babu *Girdhari Lal Agarwala*, for the appellants.

The officiating Government Advocate (Mr. W. Wallach), for the Crown.

KNOX and RYVES, JJ.—On this appeal being called on for hearing Mr. *Girdhari Lal Agarwala*, who appeared for the appellant, called our attention to the fact that out of the two assessors who

* Criminal Appeal No. 642 of 1913 from an order of E. C. Allen, Sessions Judge of Mainpuri, dated the 16th of August, 1913.

(1) Weekly Notes, 1894, p. 207.

sat with the learned Judge, one assessor, namely, Thakur Dirgbijoy Singh, had not been summoned as an assessor for the purposes of this trial. We ordered an inquiry to be made, and we find that Thakur Dirgbijoy Singh was up till 1910 on the list of assessors, but since that date he had been removed from the list. As a reason for his removal, the learned Sessions Judge gives that the Magistrate recommended this on the ground that he was a large zamindar and his position in life and status were much better than those of persons of the class from which assessors are ordinarily selected. If this be the case, we are surprised to find that this recommendation should have been made and should have met with approval. It is surely not too much to ask from Indian gentlemen of position and rank that they should assist in the administration of justice, as the sitting as an assessor can, if the list be properly prepared, occur very rarely, and probably only once in the course of three or four years. However this may be, there is no doubt that the trial of these accused persons, when one of the assessors only was an assessor summoned for the particular session is illegal, as has been pointed out in *Queen-Empress v. Badri* (1). In such a case there has been no lawful trial before a lawfully constituted tribunal. We set aside the trial, conviction and sentences and direct that the accused be retried by the court of session according to law.

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Appeal allowed.

APPELLATE CIVIL.

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Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Piggott.
NARAIN DAS (DEFENDANT) v. HAR DAYAL (PLAINTIFF) AND RUP
NARAIN (DEFENDANT).*

Hindu law—Joint Hindu family—Mortgage—Guardian ad litem—Suit on mortgage executed by father prior to birth of son—Father appointed son's guardian ad litem.

Held that, inasmuch as an after-born son cannot in a suit on a mortgage made by his father set up the defence of the immoral nature of the debt on account of which the mortgage was executed, it cannot be said that the

* First Appeal No. 111 of 1913 from an order of Kunwar Sen, Additional Judge of Moradabad, dated the 8th of April, 1913.

(1) Weekly Notes, 1894, p. 207.

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might under certain circumstances not have appointed guardian. We have, however, to consider, before interfering with the proceedings of the year 1899, whether the irregularity, if such it was, caused any damage to the plaintiff. We have therefore to consider what possible defence could have been set up in the mortgage suit. It is suggested that he might have made the defence that the debt was incurred for immoral purposes. This no doubt would be a defence which the father as guardian might find a difficulty in setting up on behalf of his son. It is now settled law that such a defence cannot be set up where the mortgage was made whilst the mortgagor was the sole owner. It must be assumed that this was always the law, and indeed it has not been shown to us that it was not the accepted law in the year 1899. We may mention here that the present suit seeks to set aside the decree of 1899, but not the decree under section 90. We cannot see that the plaintiff has suffered any damage whatever by reason of the fact that he was represented by his father in the litigation of 1899. That the mortgage was not duly executed, failure of consideration and such like were all defences which the father could have set up on behalf of his son. With regard to the decree which was subsequently made under section 90, it may be pointed out that at that time the plaintiff was represented by his mother, who was undoubtedly able to put forward any possible defence that could be made including, if necessary, the immorality of her husband. For these reasons we think that the appeal must prevail.

We accordingly allow the appeal, set aside the order of the court below and restore the decree of the court of first instance with costs in all courts.

Appeal allowed.

REVISIONAL CRIMINAL.

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September, 25.

Before Mr. Justice Ryves.

EMPEROR v. SAYEED AHMAD *

Act (Local) No. IV of 1910 (United Provinces Excise Act), section 60—Unlawful possession of excisable article—Search warrant—Act No X of 1873 (Indian Oaths Act), section 13—Presumption that oath was duly administered.

An excise inspector searched the house of a person suspected to be in illicit possession of an excisable article, namely cocaine, and cocaine was found in the house.

Held that the subsequent conviction of the person in possession of the said house was not rendered illegal by the fact that the excise inspector had not previously obtained a search warrant.

Emperor v. Allahdad Khan (1) and *Emperor v. Hargobind* (2) referred to.

Held also, that it is a reasonable presumption that an oath has been duly administered to a witness appearing before a court although the record of the court may contain no reference to that fact.

THIS was a reference from the Sessions Judge of Saharanpur recommending that the conviction of and sentence upon one Sayeed Ahmad, who had been convicted by a Magistrate of the first class, of an offence under section 60 of the United Provinces Excise Act, 1913, and sentenced to a fine of Rs. 30, should be set aside. The facts of the case and the reasons for the learned Sessions Judge's recommendation are set forth in the order of the High Court.

The applicant was not represented.

The Assistant Government Advocate (Mr. R. Malcomson), for the Crown.

RYVES, J.—This is a reference by the learned Sessions Judge of Saharanpur recommending that the conviction of Sayeed Ahmad under section 60 of the Excise Act be set aside. Sayeed Ahmad and Amir Ahmad were tried together under the same section. Both were convicted. Amir Ahmad was sentenced to rigorous imprisonment for three weeks and to a fine of Rs. 1,000 and Sayeed Ahmad was fined Rs. 30 only. Amir Ahmad appealed and the learned Sessions Judge accepted his appeal and acquitted him. His judgement in that case forms part of the record in this reference and I have examined it carefully. I am, however, not concerned with the case of Amir Ahmad. One reason for

* Criminal Reference No. 856 of 1913.

(1) (1913) 11 A. L. J., 442 : I.L.R., 35 All., 358. (2) (1912) I.L.R., 35 All., 1.

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acquitting him was that the learned Sessions Judge was of opinion that the cocaine which was admittedly found on his premises was found in a place where it could easily have been planted and that there was evidence to show that certain enemies of Amir Ahmad might well have so planted it. The only reason why I refer to that judgement at all is because many of the points taken in this reference have been dealt with more elaborately in that case. The first ground taken by the learned Judge is that the search was illegal in that the Excise Inspector, although he had full opportunity of getting a search warrant, did not do so. I do not think that the absence of a search warrant affects the legality of the trial. This point was raised very recently in the case of *King Emperor v. Allahdad Khan* (1). In that case also there was no search warrant, nevertheless the Magistrate convicted the accused. On appeal the Additional Sessions Judge held that the search was illegal and that the absence of a search warrant was fatal to the case for the prosecution. He therefore acquitted the accused. Against this order of acquittal the Local Government appealed. The Bench which heard the appeal did not decide this point and the head-note to the case of *King-Emperor v. Allahdad Khan* is in this particular wrong. In the course of their judgement the learned Judges say that they would have some hesitation in holding that the search was legal. They do not say that the search was illegal and in the concluding words of the judgement they add "we think that it was the intention of the Legislature that in a case under section 63, where it is necessary to search a house, a search warrant should be obtained beforehand." But it will be noted that in spite of this observation this Court held the order of acquittal was wrong and the conviction of the accused was maintained. In another portion of his order of reference the learned Sessions Judge says "the question is whether in the absence of a warrant the whole search is not illegal and null and void and no conviction is legally sustainable as in analogous cases under the Gambling Act." The case just quoted is an authority for the proposition that whether the search was legal or not the conviction of the accused depended, not on the legality of the search, but on the fact that cocaine was found illegally in his

(1) (1913) 11 A. L. J., 442; I.L.R., 35 All., 358.

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possession. I do not understand what the learned Sessions Judge means by the latter portion of the sentence quoted above. There is no analogy that I can see, between the Excise Act and the Gambling Act. In any case, a conviction under the Gambling Act is by no means necessarily invalid even if the search of the premises is made without a proper warrant. If a search under the Gambling Act is made illegally, the only result is that certain presumptions which can be drawn under the Act, if the search was made in accordance with a properly obtained warrant, do not arise. If authority is wanted see *Emperor v. Hargobind* (1).

The next point taken by the learned Judge is that the record does not show that any witness was examined on oath and the trial was therefore apparently illegal. Again I cannot follow the learned Sessions Judge. The trial was held by the late Mr. Clement Wright, a Magistrate of the first class. It appears from the judgement in the other case that on this occasion and apparently on this occasion for the first time, Mr. Wright recorded the evidence with his own hand and did not have it recorded in the vernacular as is the usual practice. It is true that the record does not show that an oath was administered to any of the witnesses, but I am not aware of any provision of law which requires a court examining a witness to record the fact that an oath was administered. At any rate, I do not think that the proper conclusion for the Sessions Judge to arrive at, because no note was made that an oath was administered to each witness, was that the whole trial was illegal. I may point out that in the case of Amir Ahmad, his counsel begged the court not to dispose of the appeal on that point. No suggestion was made, apparently, either in the grounds of appeal or otherwise, by any body, that as a matter of fact no oath was administered. I think the reasonable presumption would be, in the absence of any suggestion to the contrary, that proper procedure was followed. The learned Sessions Judge might have examined Mr. Wright before coming to the conclusion at which he arrived. He says that he did think of doing so, but thought it was impossible for Mr. Wright to remember whether an oath was administered in any particular case. But the learned Sessions Judge has pointed out that on this particular case Mr. Wright adopted an

(1) (1912) I. L. R., 85 All., 1.

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however, that our decision upon the present question might possibly decide important questions of principle arising perhaps under totally different circumstances. I therefore think that the present appeal ought to be referred to a larger Bench.

TUDBALL, J.—I fully agree with the learned Chief Justice that the case does involve certain questions of principle which are of considerable importance and a decision on the point by a larger Bench is a necessity in the case. I therefore agree in the order proposed.

The case coming on before the full Bench.

Babu *Purushottam Das Tandan* (with whom Dr. *Satish Ohandra Banerji*), for the appellant, contended that, even if there were no rules framed by the Government in that behalf, under the common law a suit would lie to set aside an election, and wherever a suit was allowed there was an appeal allowed also under the rules of procedure prescribed for the Civil Courts. The rules made by the Government, in regard to elections, which took away a right of appeal, militated against the common law and were therefore *ultra vires*. Section 187 of the Municipalities Act conferred powers on the Government to frame rules for the conduct of elections only up to the election stage and not beyond that. There was no statutory provision taking away the jurisdiction of the Civil Court. Every election petition was in effect a suit. A decree had been passed against the appellant and there must be some remedy provided to set it aside. Assuming that the rules were not *ultra vires*, there was an appeal allowed from the decree made by the Munsif. The Civil Procedure Code allowed an appeal from every decree and the order passed by the first court was in the nature of a decree. The court that exercised jurisdiction in such cases was a Civil Court. The Munsif was a Civil Court and a competent court. The word petition had been used in the rules, but no difference between a suit and petition appeared to have been intended. What was to be taken into consideration was the nature of the relief claimed and not merely the words used. The order of the Munsif was a final adjudication and was therefore a decree. Against a decree an appeal was allowed. The object of Rule 42 was to cut short the period of limitation and not to make any difference between a suit and a petition.

Munshi *Gobind Prasad* (with him Munshi *Lachmi Narain*) was not heard in reply.

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RICHARDS, C. J., BANERJI and TUDBALL, J. J.:—This appeal arises out of an election for the municipality of Shahjahanpur. It appears that Lala Nand Ram was a candidate for election and was declared duly elected. Chote Lal and Lachmi Narain presented a petition, under rule 42 of the election rules framed by the Local Government, in the Munsif's court. The result of the petition was that the election of Lala Nand Ram was declared void. Nand Ram, thereupon, presented an appeal to the District Judge. The District Judge held that he had no jurisdiction and dismissed the appeal. Nand Ram has now appealed to this Court.

It is argued on his behalf, first, that the rules framed by the Local Government are *ultra vires*; and, secondly, that even if these rules are valid, the order of the Munsif was a "decree" from which an appeal lay to the District Judge. Section 187 of the Municipalities Act, I of 1900, provides that the Local Government may frame forms for any proceeding of a "Board for which it considers that a form should be provided and may after previous publication make rules consistent with the Act and applicable to all Municipalities." Clause (h) provides for the making of rules "generally for regulating all elections under the Act." The contention of Nand Ram is that the powers of the Government are confined to making rules regulating matters up to election, but that for matters arising after the election, there is no power conferred by the Act upon the Local Government to make rules. In our opinion, although the clause is not very happily expressed, the words used are wide enough to permit of the Local Government framing rules connected with elections, whether before or after the counting of votes and declaration of the poll, and that it was within the power of the Government to frame rules providing for the decision of questions relating to the validity of municipal elections. In pursuance of the powers conferred by section 187 the Local Government framed the following rule:—"The validity of an election made in accordance with these rules shall not be questioned except by a petition presented to a competent court, within fifteen days after the day on which the election was held, by a person or persons enrolled in the municipal election roll." Clause (2) of this rule is as follows:—"If the election be declared void, the person whose election was questioned

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Mr. *M. L. Agarwala*, for the pre-emptors appellants, contended that the order under section 148, Civil Procedure Code, not being a decree, was not appealable: the case of *Rahima v. Nepal Rai* (1) was under section 87 of the Transfer of Property Act. There the order was a decree and therefore was appealable. An order for the extension of time does modify a part of the decree, but does not come within the definition of decree, which is a limited one in its nature. A revision would have to be filed against the order of amendment when the court had no power to make such amendment. An order under section 148 of the Code of Civil Procedure was not of the nature of the amendment of the decree. The decree was in fact never amended. It was submitted that section 148 applied to the case and no appeal lay from the order passed under that section as it could not be deemed to be a decree. If section 148 gave a discretion to the Munsif in pre-emption cases to extend time, it was properly exercised and the District Judge ought not to have interfered with the Munsif's order. If it did not apply, there was no appeal against the Munsif's order. The only remedy was an application for revision which had been filed and rejected. Section 148 could apply to such cases as well. Special provision was necessary in mortgage suits, as the Legislature intended that time in those cases should be extended only when there was good cause shown for it. Section 148 of the Code of Civil Procedure gave a discretion even when no good cause was shown. Order XX, rule 14, of the Code of Civil Procedure prescribed or allowed the payment into court of the purchase money, and when any period was fixed or granted by the court for the doing of any act prescribed or allowed by the Code, the court could extend the time under section 148. The words used in the section were "prescribes" or "allows" and when the court allowed time for payment it was the act of payment that was the act allowed.

Dr. *Surendra Nath Sen*, for the vendees respondents, submitted that an appeal lay from the order as that order was substituted for the original decree. Mr. Amir Ali's Civil Procedure Code, p. 837, was cited. Further, the order for extension of time was in effect an order in execution and was, therefore, appealable. The respondent

then might be allowed to apply for a review of the order rejecting the revision.

RICHARDS, C. J., BANERJI and TUDBALL, J.J.:—The facts out of which this and the connected appeal, No. 28 of 1913 under the Letters Patent, arise, are shortly as follows:—Two suits for pre-emption were brought by rival pre-emptors. These suits resulted in decrees by which the pre-emptors obtained the property in equal shares, conditional upon their paying their half shares of the purchase money into court, within the time specified in the decrees. The time specified elapsed without the purchase money having been paid by either pre-emptor.

Applications were thereupon made, purporting to be under section 148 of the Code of Civil Procedure, asking the court to extend the time of payment of the purchase money. The learned Munsif granted the application and extended the time. The purchase money was paid into court within the extended time.

Appeals were preferred by the defendants vendees against the order of the Munsif extending the time. Afterwards the decrees were put into execution. The appeal against the order of the Munsif extending the time coming before the District Judge, he held that section 148 did not apply and accordingly set aside the orders of the Munsif.

Second appeals were then preferred to this Court by the decree-holders on the ground that the decision of the Munsif was correct and ought not to have been interfered with by the District Judge, and, secondly, on the ground that no appeal lay to the District Judge. The vendees filed applications in revision contending that the Munsif had no jurisdiction under section 148 to extend the time. The second appeals and the applications in revision came before a learned Judge of this Court, who held that an appeal did lie to the District Judge and that his orders setting aside the orders of the Munsif were correct, and dismissed the second appeals. The applications for revision were dismissed because the learned Judge thought that there was no necessity for revision.

The plaintiffs have appealed under the Letters Patent.

The first question which we propose to deal with is whether the learned Munsif was right in extending the time for the payment of the purchase money under the provisions of section 148 of

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the Code of Civil Procedure. That section is as follows:—"Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Code, the court may in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired."

It is contended on behalf of the appellant that order XX, rule 14, "prescribes" or "allows" the payment into court of the purchase money by the successful pre-emptor. On reading order XX, rule 14, it will at once appear that all that is "prescribed" by the Code is the form which the decree in a pre-emption suit is to take where the plaintiff is successful and has not paid the money into court before decree. It nowhere prescribes or allows the payment into court of the purchase money. Such payment is in reality an incident of the claim for pre-emption. All that the order provides for is uniformity in the form of the decree which the courts make. We agree with the view taken by the learned Judge of this Court that section 148 does not entitle the court to extend the time fixed by the decree for the payment of the purchase money in pre-emption cases.

The next question is whether an appeal lay from the decision of the Munsif to the District Judge. Appeals only lie from decrees as defined by section 2 of the Code of Civil Procedure and from orders as specified in section 104. It seems to us that an order made under section 148 is clearly not an appealable order and is not a decree within the definition in section 2, nor is it an order covered by section 104. The only way therefore in which this order could have been set aside was by an application in revision to this Court. We at present have no application in revision before us.

The learned Judge of this Court was of opinion that he was bound by the ruling in *Rahima v. Nepal Rai* (1). In that case it was held that an order under section 87 of Act No. IV of 1882 extending the time for payment of the mortgage money by a mortgagor was a decree within the meaning of sections 2 and 244 of the Code of Civil Procedure of 1882. We may point out that that case entirely proceeded under the rulings of this Court in which it had been held that proceedings under the Transfer of

(1) (1892) I. L. R., 14 All., 520.

Property Act, subsequent to decree, were questions relating to the execution, discharge or satisfaction of the decree. This is certainly not so under the new Code. Special provision is, however, made for mortgage decrees and orders refusing to extend the time are expressly made appealable under order XLIII, rule 1, clause (o).

Under these circumstances we must allow the appeal, and set aside the decree of this Court and also of the District Judge. The parties will pay their own costs.

Appeal allowed.

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